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No. 94-94-7448

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
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ROLAND J. BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 5-4 decision of the court below misinterpreted 18 U.S.C. § 924(c)(1) -- which imposes a mandatory 5-year consecutive sentence on a person who "uses or carries" a firearm "during and in relation to" a drug trafficking offense -- by adopting a standard that looks solely to the "proximity and accessibility" of the firearm to the drugs or drug proceeds rather than to active employment of the firearm.

RULE 14.1(b) STATEMENT

In addition to the parties listed in the caption, Candisha S. Robinson was a defendant in an unrelated criminal prosecution, which the court of appeals consolidated with this case for purposes of rehearing in banc.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
I. THE DECISION BELOW CONFLICTS WITH THE INTERPRETATION OF 18 U.S.C. § 924(c)(1) BY SEVERAL OTHER COURTS OF APPEALS	9
II. THE CORRECT INTERPRETATION OF SECTION 924(c)(1) IS A QUESTION OF GREAT IMPORTANCE	16
III. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS	18
CONCLUSION	27

TABLE OF AUTHORITIES

Pages

Cases

Brown v. *Gardner*, 63 U.S.L.W. 4035 (U.S. Dec. 12 1994) 22

City of Chicago v. *Environmental Defense Fund*, 114 S. Ct. 1588 (1994) 22

John Hancock Mutual Life Insurance Co. v. *Harris Trust & Savings Bank*, 114 S. Ct. 517 (1993) 22

King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991) 22

Langston v. *United States*, 113 S. Ct. 361 (1992) . . . 8, 16, 17

Ratzlaf v. *United States*, 114 S. Ct. 655 (1994) 24

Smith v. *United States*, 113 S. Ct. 2050 (1993) 5, 6, 7, 9-10, 23

United States Department of Treasury v. *Fabe*, 113 S. Ct. 2202 (1993) 23

United States v. *Brown*, 915 F.2d 219 (6th Cir. 1990) 8

United States v. *Castro-Lara*, 970 F.2d 976 (1st Cir. 1992), cert. denied, 113 S. Ct. 2935 (1993) 8

United States v. *Clemis*, 11 F.3d 597 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994) 12, 19

United States v. *Connor*, 972 F.2d 1172 (10th Cir. 1992) . . . 13

United States v. *Duke*, 940 F.2d 1113 (8th Cir. 1991) 8

United States v. *Featherson*, 949 F.2d 770 (5th Cir. 1991), cert. denied, 112 S. Ct. 1771 (1992) 16

United States v. *Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988) 9, 11, 12, 14, 15

United States v. *Granderson*, 114 S. Ct. 1259 (1994) . . . 25, 26

United States v. *Gunning*, 984 F.2d 1476 (7th Cir. 1993) 24

TABLE OF AUTHORITIES -- Continued

Pages

United States v. *Hadfield*, 918 F.2d 987 (1st Cir. 1990), cert. denied, 500 U.S. 936 (1991) 14, 16

United States v. *Harrison*, 931 F.2d 65 (D.C. Cir.), cert. denied, 112 S. Ct. 408 (1991) 24

United States v. *Hill*, 967 F.2d 902 (3d Cir. 1992) 9

United States v. *Joseph*, 892 F.2d 118 (D.C. Cir. 1989) 24

United States v. *Lasanta*, 978 F.2d 1300 (2d Cir. 1992) . . . 12

United States v. *Long*, 905 F.2d 1572 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990) 11, 21

United States v. *Lyman*, 892 F.2d 751 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990) 14

United States v. *Matra*, 841 F.2d 837 (8th Cir. 1988) 16

United States v. *Matthews*, 942 F.2d 779 (10th Cir. 1991) 9, 13, 15-16

United States v. *McFadden*, 13 F.3d 463 (1st Cir. 1994) 6, 18-19, 21, 25, 26

United States v. *Meggett*, 875 F.2d 24 (2d Cir.), cert. denied, 493 U.S. 858 (1989). 9

United States v. *Nicholson*, 983 F.2d 983 (10th Cir. 1993) 24

United States v. *Parrish*, 925 F.2d 1293 (10th Cir. 1991) 9

United States v. *Paz*, 927 F.2d 176 (4th Cir. 1991) 8

United States v. *Poole*, 878 F.2d 1389 (11th Cir. 1989) 8

United States v. *Sullivan*, 919 F.2d 1403 (10th Cir. 1990), cert. denied, 113 S. Ct. 1013 (1993) . . . 9, 13, 19

United States v. *Taylor*, 18 F.3d 55 (2d Cir.), cert. denied, 114 S. Ct. 2720 (1994) 14-15

TABLE OF AUTHORITIES -- Continued

Pages

United States v. *Theodoropoulos*, 866 F.2d 587 (3d Cir. 1989) 9, 12, 15

United States v. *Torres-Maldonado*, 14 F.3d 95 (1st. Cir.), cert. denied, 115 S. Ct. 193 (1994) . . 10-11, 14, 15

United States v. *Torres-Rodriguez*, 930 F.2d 1375 (9th Cir. 1991) 8

United States v. *Villagrana*, 5 F.3d 1048 (7th Cir. 1993) 8

United States v. *Wilson*, 884 F.2d 174 (5th Cir. 1989) 8

Statutes

18 U.S.C. § 924(c)(1) . . . . . passim

18 U.S.C. § 924(d) 7, 22-23

18 U.S.C. § 3231 4

28 U.S.C. § 1291 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1294(1) 4

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ROLAND J. BAILEY, PETITIONER

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PETITION FOR A WRIT OF CERTIORARI

Roland J. Bailey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the in banc court of appeals (App., *infra*, 1a-21a) is reported at 36 F.3d 106. The order granting rehearing en banc (App., *infra*, 22a-23a) is reported at 4 F.3d 1004. The opinion of the panel of the court of appeals (App., *infra*, 24a-32a) is reported at 995 F.2d 1113.

JURISDICTION

The court of appeals entered its judgment on October 4, 1994. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, shall, in addition to the punishment provided for such crime * * *, be sentenced to imprisonment for five years * * *, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment * * *."

STATEMENT

1. On May 2, 1988, two police officers stopped petitioner Roland J. Bailey when they noticed that the car he was driving had no front license plate and no inspection sticker. App., *infra*, 3a. Bailey was ordered out of the car when he produced a District of Columbia identification card in response to the officers' request for his driver's license. *Id.* at 3a, 25a. The officers searched the passenger compartment of the car and discovered a satchel containing 30 grams of cocaine. *Id.* at 3a.

After arresting Bailey, the officers unlocked the car trunk (which was inaccessible from the passenger compartment) and found a vest containing approximately $2500 in cash.[1] The police also found, beneath "a whole lot of items" including "clothing and bags and other things," a bag containing a 9-mm. gun. 2/27/90 Tr. 93-94, 108. The police officers could not see the gun when the trunk

[1] The court below twice misstated the record in declaring that the trunk contained $3216 (App., *infra*, 3a, 25a). In fact, undisputed record evidence shows that the police found a *total* of $3216, but that only about $2500 was in the trunk; the remaining $700 was on Bailey's person. 2/27/90 Tr. 97.

was opened (*id.* at 82, 109); indeed, the trunk was so full that it took roughly one minute to find the bag containing the gun (*id.* at 109). Both officers testified that they did not see Bailey do anything other than drive the car. *Id.* at 76, 107-108.

2. The government charged Bailey in a three-count indictment with (1) possession of cocaine with intent to distribute it, (2) using or carrying a firearm during and in relation to a drug trafficking crime, and (3) illegal possession of a firearm. At trial, Detective DiDomenico, a government expert, testified that the quantity of cocaine in Bailey's car indicated that it was intended for street sale, and that drug dealers frequently have a firearm "on their person or within reach" (2/27/90 Tr. 161) to protect themselves, "their assets, drugs and money" (App. *infra*, 3a-4a). Detective DiDomenico testified further that the purpose of having a firearm within reach was for protection against "stickup boys" who try to steal the drugs or money. 2/27/90 Tr. 164-167. DiDomenico emphasized that a drug seller would need immediate access to his firearm because he would get no notice before a "stickup boy" confronted him:

> Q. (by defense counsel): In all your experience talking with the stickup boys, did any of them ever tell you that they ever gave the person they were sticking up an opportunity to go get their gun first?
>
> A. (DiDomenico): That's ridiculous, no.

2/27/90 Tr. 167. Significantly, the gun in this case was not on Bailey's person or within his reach: it was buried amidst clothing and other innocuous items in the locked trunk of a moving car.

3. Bailey was convicted on all three counts of the indictment and was sentenced to concurrent 51-month terms on Counts I and III, and to a consecutive 60-month term on the Section 924(c)(1) conviction. App., *infra*, 4a. A panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. *Id.* at 24a-30a.[2] Bailey had already completed his sentences on Counts I and III, and the only issue raised in his petition for rehearing and suggestion of rehearing in banc concerned his Section 924(c)(1) conviction for using or carrying a firearm during and in relation to his possession of cocaine with intent to distribute it.

The D.C. Circuit granted rehearing in banc and consolidated Bailey's case with the unrelated prosecution of another defendant, Candisha Robinson. App., *infra*, 22a-23a. A sharply divided court then affirmed Bailey's and Robinson's convictions under Section 924(c)(1). With only five judges subscribing to the majority opinion, the court held that, when the predicate drug trafficking offense is possession with intent to distribute, the prosecution need only show (1) that a firearm was located near the drugs or drug proceeds, and (2) that the gun was sufficiently accessible at some point during the drug possession to have been available for use if the need arose. App., *infra*, 3a, 13a.

The court held that one "uses" a gun within the meaning of Section 924(c)(1) by placing *or keeping* the gun in a location "from

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[2] The D.C. Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1); the United States District Court for the District of Columbia had original jurisdiction pursuant to 18 U.S.C. § 3231.

which one (or one's agent) can gain access to it *if and when needed to facilitate a drug crime.*" App., *infra*, 10a (emphasis added). While recognizing that Section 924(c)(1) does not criminalize "the mere possession of a firearm by someone who commits a drug offense" (*id.* at 4a), the court reasoned that "use" is an "expansive[]" term that does not require active employment of a gun. *Id.* at 9a-10a (citing *Smith* v. *United States*, 113 S. Ct. 2050, 2054, 2058 (1993)). Thus, the court concluded that a jury can infer "use" whenever the *potential for use* inheres in the location of the gun. The court held further that, when the predicate drug offense is a "continuing offense" such as possession with intent to distribute, the government need only show that the gun was located near the drugs "at some point" in time during the defendant's possession of drugs. App., *infra*, 10a.

The majority also held that a firearm is used "during and in relation to" a predicate drug offense if it is "positioned so as to be available for use during ongoing drug activity." App., *infra*, 11a. The court stressed that the gun did not have to "further" the drug offense, provided that its location suggests that it had the *potential* to facilitate the drug offense. *Ibid.*

Applying those standards, the court concluded that the gun in the locked trunk of Bailey's car was "used" because it was "proximate to the drugs" in the passenger compartment. *Id.* at 12a. The court also ruled that the gun was used "during and in relation to" Bailey's illegal possession of drugs because the gun "was easily accessible to Bailey at any time." *Ibid.* The majority

opinion made no attempt to define the "carry" component of Section 924(c)(1) or to delimit the scope of "use" *vis-à-vis* "carry."

Judge Wald dissented in part. App., *infra*, 13a-15a. She stated that the majority's twofold standard for determining whether a firearm was "used" -- proximity of the gun to drugs or drug proceeds, and accessibility of the gun at some point during the possession offense -- "artificially limit[s]" the factors necessary to distinguish "use" from mere possession. *Id.* at 14a. Judge Wald identified several additional factors, such as the number and type of gun involved, whether the gun was loaded, and whether expert testimony supported an inference of "use," that are crucial for distinguishing "use" from mere possession. *Ibid.* Despite her staunch disagreement with the legal standard adopted by the majority, Judge Wald -- alone among the nine participating judges of the court of appeals -- concluded that Bailey's conviction could be affirmed through the application of a traditional balancing of the appropriate factors.

Judge Williams, joined by Judges Silberman and Buckley, dissented outright. App., *infra*, 15a-21a. Judge Williams faulted the majority's reliance on inferences of *potential* use, arguing that, under the plain meaning of the statutory term, "use" "normally implies activity." *Id.* at 15a, 16a (citing *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)). The three-judge dissent expressly rejected the majority's reliance on *Smith* v. *United States* to extend "use" to encompass situations of potential use (App., *infra*, 19a):

> Nothing in *Smith* precludes limiting "use" to active employment. [*Smith's*] statement that "§ 924(c)(1)'s language sweeps broadly", 113 S. Ct. at 2054, means only that the proscribed use of firearms is not limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing [in Smith] expands "use" beyond active employment.

Judge Williams also noted that Section 924 itself distinguishes between the actual use of a firearm, on the one hand, and the intent or potential for use, on the other. *Id.* at 18a. Subsection (d) of Section 924 provides for forfeiture of firearms "used in any knowing violation" of certain offenses, and of firearms "intended to be used" in other crimes. "Thus Congress [was] clearly quite alert to the distinction between firearms 'used' in commission of a crime and merely 'intended' for such use * * *." *Ibid.* Quoting this Court's observation in *Smith*, 113 S. Ct. at 2057, that "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)," Judge Williams concluded that the majority opinion was inconsistent with Congress's choice not to reach mere "intent to use" in subsection (c). Finally, Judge Williams observed that the majority's definition of "use" was so broad "as to leave no apparent role" for the alternate element of "carrying" a firearm during and in relation to a drug offense. App., *infra*, 18a.

Judge Silberman, in addition to joining Judge Williams' dissent, filed a separate one-paragraph dissent. Stressing the "difficult[y] [of the] question presented" and the pressing need

for "a more coherent standard firmly rooted in the statute" -- which had led the court to grant rehearing in banc -- Judge Silberman lamented that the majority had not "marshaled the effort to confront fully the analysis set forth in [Judge Williams'] dissent." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

Two years ago, this Court noted divergences among the courts of appeals in their interpretations of Section 924(c)(1). *Langston* v. *United States*, 113 S. Ct. 361, 361-362 (1992) (White, J., joined by Thomas, J., dissenting from denial of certiorari). Those divergences have deepened with the passage of time. Currently, five courts of appeals unambiguously hold that mere possession of a firearm by someone who commits a drug offense is not sufficient to establish "use" under Section 924(c)(1).[3] Three courts of appeals, on the other hand, have definitively held that mere possession -- or even constructive possession -- of a firearm during a drug offense does suffice.[4] Three appear to have embraced

[3] See, *e.g.*, *United States* v. *Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992), cert. denied, 113 S. Ct. 2935 (1993); *United States* v. *Wilson*, 884 F.2d 174, 177 (5th Cir. 1989); *United States* v. *Brown*, 915 F.2d 219, 224 (6th Cir. 1990); *United States* v. *Villagrana*, 5 F.3d 1048, 1051 (7th Cir. 1993); *United States* v. *Duke*, 940 F.2d 1113, 1118 (8th Cir. 1991).

[4] See, *e.g.*, *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991) (constructive possession of firearm sufficient to establish "use"); *United States* v. *Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991) (possession of firearm constitutes "use"); *United States* v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989) (same).

both of those irreconcilable holdings.[5]

The majority opinion below did nothing to harmonize the discord among the circuits; on the contrary, it added yet another dissonant voice by formulating a new standard for Section 924(c)(1) analysis that -- while coming dangerously close to equating "use" with mere possession -- is formulated differently from the standards employed in all of the other courts of appeals. This Court should grant certiorari to bring order to those substantial conflicts. Moreover, the correct interpretation of Section 924(c)(1) presents an important issue, particularly in light of the frequency with which the issue arises in the lower courts. Certiorari is also warranted because the decision below is erroneous.

I. THE DECISION BELOW CONFLICTS WITH THE INTERPRETATION OF 18 U.S.C. § 924(c)(1) BY SEVERAL OTHER COURTS OF APPEALS

In *Smith* v. *United States*, this Court held that the plain language of Section 924(c)(1) requires two elements to be proved

[5] Compare *United States* v. *Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988) ("section 924(c) requires more than mere possession of a firearm"), with *United States* v. *Meggett*, 875 F.2d 24, 28 (2d Cir.) ("mere possession of a gun can constitute 'use'"), cert. denied, 493 U.S. 858 (1989). Compare *United States* v. *Theodoropoulos*, 866 F.2d 587, 597 (3d Cir. 1989) (mere availability of a firearm does not constitute use during and in relation to a drug offense), with *United States* v. *Hill*, 967 F.2d 902, 906-907 (3d Cir. 1992) (gun "used" if defendant had unimpeded access to it). Compare *United States* v. *Matthews*, 942 F.2d 779, 783 (10th Cir. 1991) (accessible gun not "used" within meaning of Section 924(c)(1) without evidence that the defendant "intended to avail himself of the firearm"), and *United States* v. *Sullivan*, 919 F.2d 1403, 1432 (10th Cir. 1990) (mere possession not enough), cert. denied, 113 S. Ct. 1013 (1993), with *United States* v. *Parrish*, 925 F.2d 1293, 1298 (10th Cir. 1991) (access to a gun establishes "use" if the defendant is involved in a drug trafficking offense).

beyond a reasonable doubt. First, the accused must have "use[d]" or "carrie[d]" the firearm; second, such use or carrying must have been done "during and in relation to" a drug trafficking offense. 113 S. Ct. 2050, 2058 (1993). The majority opinion in the court below adopted a "proximity and accessibility" standard for evaluating those two elements. App., *infra*, 13a. The court held that, as a matter of law, a firearm is "used" if it is kept in a location that is proximate to the location of drugs or drug proceeds. App., *infra*, 10a. The court then held that any such "use" of a firearm was necessarily "during and in relation to" a drug offense if the firearm was accessible to the accused -- that is, "positioned so as to be available for use" if the need arose -- at any time during the drug offense. *Id.* at 11a.

Under the approach of the court below, the inquiry for both elements focuses on the location of the firearm; if the location is such that the accused could retrieve and employ the firearm at any time during the drug offense, the elements of Section 924(c)(1) are met. The court rejected the notion that Section 924(c)(1) requires active or actual use of a firearm (App., *infra*, 9a); rather, the potential for use suffices. Furthermore, when the predicate drug offense is possession with intent to distribute, Section 924(c)(1) is satisfied if the jury could infer that the firearm was proximate and accessible *at any time* during the drug possession. *Id.* at 10a.

Decisions of the First and Second Circuits have squarely rejected the stark "proximity" test embraced by the court below. In *United States* v. *Torres-Maldonado*, 14 F.3d 95, 101-102 (1st

Cir.), cert. denied, 115 S. Ct. 193 (1994), the First Circuit reversed a Section 924(c)(1) conviction even though a gun was found in the same room as $4000 in cash, cocaine, and drug-dealing paraphernalia. That court expressly rejected the government's argument that the mere "physical proximity" of the gun to the drugs sufficed to establish use. Instead, the court looked for evidence that the defendant "exercised" dominion over the gun or "participated in armed drug deals." Finding no such evidence, the court reversed the conviction.

In *United States* v. *Feliz-Cordero*, *supra*, the Second Circuit reversed a conviction under Section 924(c)(1) on the ground that the presence of a firearm "in the same room as" drugs, drug proceeds, and drug paraphernalia "is not sufficient evidence to sustain a conviction." 859 F.2d at 254. The court reasoned that the presence of a firearm at the apartment did not constitute "use" because Congress did not intend to penalize the mere possession of a firearm during a drug offense. *Ibid.*; see also *United States* v. *Long*, 905 F.2d 1572, 1578 n.10 (D.C. Cir.) (Thomas, J.) ("A person can possess a gun without * * * 'using' it."), cert. denied, 498 U.S. 948 (1990).

Decisions of the Second and Sixth Circuits are inconsistent with the D.C. Circuit majority's position that, when the predicate drug offense is a "continuous offense" such as possession with intent to distribute, the presence of a firearm at the time of arrest supports an inference that the gun was used at some prior time during the possessory offense. See App., *infra*, 10a. In

United States v. *Lasanta*, 978 F.2d 1300, 1308-1309 (1992) (citing *Feliz-Cordero*, *supra*), the Second Circuit held that the possession of a firearm did not support an inference that the gun had provided protection at some prior drug transaction. In *United States* v. *Clemis*, 11 F.3d 597 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994), the Sixth Circuit held that the presence of firearms in a house containing marked money from a controlled drug sale did not, standing alone, constitute "use" of those weapons (*id.* at 602 (emphasis added)):

> The government would have us recognize that the presence of the "marked" money establishes that the weapons found were used to protect the proceeds of a drug transaction, thereby facilitating the drug transaction. We cannot make this jump. While we agree that the terms of [Section 924(c)(1)] are to be construed broadly, *it is still the law that mere possession of a weapon during the course of criminal conduct is not enough.*

Numerous decisions have rejected the broad "accessibility" test approved below for establishing that a firearm was used or carried "during and in relation to" the predicate drug offense. In *United States* v. *Theodoropoulos*, 866 F.2d 587 (1989), for example, the Third Circuit reversed a Section 924(c)(1) conviction even though drugs were found inside an apartment and loaded guns were discovered outside on the porch. The court held that "the mere availability of a firearm nearby * * * [does not] equal * * * use 'in relation to'" a drug trafficking offense. *Id.* at 597. The court reasoned that the accessibility test urged by the government impermissibly extended Section 924(c)(1) to situations in which a firearm was merely possessed during a predicate offense: "Had [Congress] intended the provision to encompass possession of a

firearm during a drug trafficking offense it would have so provided." *Id.* at 597-598.

Likewise, the Tenth Circuit has repeatedly rejected the argument that the government need only show that a firearm was accessible at some time during a drug offense to meet the "during and in relation to" test. In *United States* v. *Connor*, 972 F.2d 1172, 1174 (1992), the court held that "[m]ere access to a firearm is insufficient to sustain a conviction" because access alone cannot prove that the firearm was an "integral part of the drug trafficking offense." In *United States* v. *Matthews*, 942 F.2d 779, 783 (10th Cir. 1991), the court reversed a Section 924(c)(1) conviction even though it found that a firearm was accessible to the defendant during the drug offense: "[S]ection 924(c)(1) requires more than mere access to a firearm." See also *United States* v. *Sullivan*, 919 F.2d 1403, 1432 & n.45 (10th Cir. 1990) (access to firearm, standing alone, is insufficient to support a Section 924(c)(1) conviction).

The decision below also conflicts with decisions from other courts of appeals in that it curtails the number of factors that courts may consider in determining whether a firearm was used or carried during and in relation to a drug offense. In the D.C. Circuit, it is now the law that only two factors are relevant in Section 924(c)(1) analysis: the proximity of the firearm to drugs or drug proceeds, and the accessibility of the firearm. See App., *infra*, 3a. The court has discarded several other factors on which prior panel opinions had relied, stating that such factors

"produced widely divergent and seemingly contradictory results." *Id.* at 7a. Other courts of appeals, however, employ those very factors in Section 924(c)(1) analysis.

The First and Second Circuits have both relied on a factor rendered completely irrelevant by the decision below -- the absence of evidence of an drug actual transaction -- in reversing Section 924(c)(1) convictions. See *Feliz-Cordero*, 859 F.2d at 254; *Torres-Maldonado*, 14 F.3d at 101-102. The First, Second, and Eighth Circuits have relied on the type and number of firearms involved in determining whether an inference of "use" was justified. See *United States* v. *Hadfield*, 918 F.2d 987 (1st Cir. 1990), cert. denied, 500 U.S. 936 (1991); *Feliz-Cordero*, 859 F.2d at 254; *United States* v. *Lyman*, 892 F.2d 751, 753 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990). That factor, too, has now been rendered irrelevant in the D.C. Circuit by the opinion below.

The opinion below is inaccurate in stating that "[e]very other circuit similarly focuses, in essence," solely on the proximity and accessibility factors. App., *infra*, 8a. To the contrary, while every circuit does indeed apply those two factors, *only* the D.C. Circuit excludes all others from consideration. See App., *infra*, 13a (Wald, J., dissenting) ("the majority's new 'proximity and accessibility' test offers only a straightjacket [*sic*]" for judges faced with "a steady stream of new fact situations"). The majority opinion itself acknowledged that its truncated Section 924(c)(1) analysis conflicted with the approach of at least one other court of appeals. App., *infra*, 9a (citing *United States* v. *Taylor*, 18

F.3d 55, 58 (2d Cir.) (analysis of sufficiency challenge to Section 924(c)(1) conviction "is clearly a very fact-intensive question [that] requir[es] a careful examination of, among other things, where the gun was located and what else was found in the apartment"), cert. denied, 114 S. Ct. 2720 (1994).

Bailey's conviction under Section 924(c)(1) would have been reversed if the D.C. Circuit had not crafted its new two-factor test for evaluating the sufficiency of the evidence against him, because the evidence showed (at most) that Bailey possessed a gun. First, there was no proof of any actual drug transaction at which the gun in the trunk played a role. The only activity Bailey engaged in was driving a car; the presence of the gun in the locked trunk of that moving car had no role, active or otherwise, in his possessory crime. See *Feliz-Cordero*, 859 F.2d at 254 (reversing Section 924(c)(1) conviction where there was no evidence of a specific drug transaction involving the firearm); *Torres-Maldonado*, 14 F.3d at 101-102 (same). Second, the gun was sufficiently removed from Bailey to preclude an inference that he derived any service from it. Indeed, the government conceded that "the firearm was relatively inaccessible." United States' Response to Appellant's Petition for Rehearing With Suggestion For Rehearing En Banc, at 2. Compare *Theodoropoulos*, 866 F.2d at 597 (reversing Section 924(c)(1) conviction where firearm was "nearby" but not within reach); *Feliz-Cordero*, 859 F.2d at 254 (reversing Section 924(c)(1) conviction where the firearm in dresser drawer was not sufficiently accessible); and *Matthews*, 942 F.2d at 783-784

(reversing Section 924(c)(1) conviction where gun in different room was removed from defendant's access), with *United States* v. *Featherson*, 949 F.2d 770, 772 (5th Cir. 1991) (affirming Section 924(c)(1) conviction where firearm was within six to eight feet of defendant in apartment), cert. denied, 112 S. Ct. 1771 (1992).

Third, only a single firearm was found in the trunk of Bailey's car. Although a single weapon can support an inference of "use" in appropriate cases, a purely circumstantial showing of "use" is greatly weakened by the fact that no other weapons were present. See, *e.g.*, *Hadfield*, 918 F.2d at 991 (presence of nine firearms supported inference of "use"); *United States* v. *Matra*, 841 F.2d 837, 843 (8th Cir. 1988) (presence of seven guns, including assault rifle and submachine gun, in a crack house supports inference of "use").

The majority opinion's "proximity and accessibility" standard, combined with its willingness to let juries infer past usage of a firearm from present possession, short-circuited the Section 924(c)(1) analysis that would have been applied in other circuits. Bailey's conviction was upheld on evidence that showed nothing more than the possession of a firearm simultaneous with a drug trafficking offense. Many other circuits would reverse a Section 924(c)(1) conviction based only on such a showing. See notes 3 & 5, *supra*.

II. THE CORRECT INTERPRETATION OF SECTION 924(c)(1) IS A QUESTION OF GREAT IMPORTANCE

The lower courts have been called on with increasing frequency to determine the proper scope of Section 924(c)(1). See *Langston*, 113 S. Ct. at 362 (White, J., joined by Thomas, J., dissenting from

denial of certiorari) ("this issue arises with some frequency"). The courts of appeals have issued hundreds of rulings -- published and unpublished -- in the last few years in which the principal issue on appeal has been whether the evidence met the legal standard to support a conviction under Section 924(c)(1). The district courts must resolve that issue even more frequently.

The conflicts among the courts of appeals that two Justices noted in 1992 still "show[] no signs of abating." *Langston*, 113 S. Ct. at 362 (dissent). To the contrary, the discussion above illustrates that the divisions have become deeper and more numerous. Resolution by this Court of the proper interpretation of Section 924(c)(1) is necessary to promote uniformity in the courts of appeals and to prevent applicability of this federal statute from depending on the fortuity of the defendant's locale.

Section 924(c)(1) convictions entail serious consequences for defendants. If a defendant is convicted under Section 924(c)(1), the trial court is required to add a five-year *consecutive* sentence to the sentence for the defendant's underlying crime. The trial court has no discretion in the matter, nor can the Sentencing Guidelines lessen the blow. In some cases, such as Bailey's, the Section 924(c)(1) violation more than doubles the punishment for the underlying offense.

This case presents a singularly appropriate vehicle for this Court to address the meaning of "use" of a firearm "during and in relation to" a drug trafficking offense. Although the issue arises in varying fact patterns, Bailey's case -- involving a gun that the

government has conceded was "relatively inaccessible" in the locked trunk of a moving vehicle -- represents one typical scenario, and one clearly at the outer fringes of the government's plausible candidates for a "use" prosecution. The issue was explored with unusual thoroughness in this case, and the D.C. Circuit majority's attempt to craft a bright-line rule, while in conflict with other circuits and (we submit) ultimately misguided, sharpens the issues for this Court's consideration -- a feature lacking in most Section 924(c) cases. The thoughtful dissenting opinions below likewise will aid this Court's consideration of the issue presented. If this Court wishes ever to address the important and recurring -- but elusive -- issue of the scope of Section 924(c)(1), this case is an unusually compelling candidate for review.

III. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

Unanimously declining to go as far as the Fourth, Ninth, and Eleventh Circuits (and panels of the Second, Third, and Tenth), see notes 4 & 5, *supra*, the D.C. Circuit correctly conceded that Congress did not intend in Section 924(c)(1) to reach mere possession of a firearm. App., *infra*, 4a. The majority then attempted to draw a line between possession and use, but the line it drew is invisible.

A. By focusing on the proximity of a firearm, and by relying on *inferences* of *potential* use rather than *evidence* of *actual* use, the court affirmed Bailey's conviction based on the "theoretical possibility" of use rather than on use itself. See *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting). The "ordinary meaning" of

the word "use" "carries a more active meaning"; it "excludes simple (drug-crime-related) possession." *Id.* at 466-467. The "proximity" standard adopted by the opinion below violates that ordinary, active meaning of "use" by expanding it to include the possibility of future use "when needed to facilitate a drug crime." App., *infra*, 10a.

The opinion below states that a firearm kept in an accessible location is "used" because it can serve to protect the defendant, drugs, and drug proceeds. App., *infra*, 9a, 10a, 12a. But that rationale is necessarily too broad, if in fact Section 924(c)(1) does not reach mere possession, because it would apply "virtually whenever a gun is present near the scene of a drug crime." *McFadden*, 13 F.3d at 469 (Breyer, C.J., dissenting). Such a "possession for protection" theory sweeps all cases of mere possession within the ambit of "use" because all firearms -- even those that are only possessed -- have a potential utility. See *ibid.* (under the "possession for protection" theory, "possession of a gun (when related to a drug crime) *automatically* means a 'use'") (emphasis in original); see also *Sullivan*, 919 F.2d a 1432 & n.45 (rejecting the "possession for protection" rationale).

Furthermore, the "continuing nature" of the predicate drug offense of possession with intent to distribute cannot justify inferring past use of a firearm from present possession. *Clemis*, 11 F.3d at 602. Such a principle subsumes all cases of mere possession and permits conviction based on mere speculation of past use. The present case illustrates that problem. The prosecution

presented no evidence whatever that Bailey used the firearm in his trunk at any time in the past. Accordingly, the court relied on generalizations about the prevalence of gun usage in the drug world (App., *infra*, 12a) to conclude that past use could be inferred from Bailey's possession of a firearm at the time of arrest. Permitting one person to be convicted on the basis of assumptions about other persons' conduct demonstrates the limitless reach of the majority opinion's interpretation of "use."

The "emboldening" rationale approved by the majority (App., *infra*, 4a-5a) -- which holds that a firearm is "used" if the possessor was "emboldened" by the gun's existence -- suffers the same defect: it fails to separate use from possession. A jury could infer *in every case* that the possession of a gun somehow "enhance[d] the defendant's confidence." App., *infra*, 19a (Williams, J., joined by Silberman and Buckley, JJ., dissenting). Moreover, the "emboldening" theory invites juries and courts to speculate about whether a defendant was psychologically comforted by the existence of a gun, an inquiry that is incapable of consistent application and is impossible to review. Thus, the "emboldening" rationale promises either "a carte blanche for conviction" or a "continuous and vacillating review of jury verdicts." *Id.* at 20a.

The mercuric rationales advanced in the majority opinion point out the need for tangible guideposts for juries and courts to follow in separating the actual use of a gun from the "theoretical possibility" of use. The "active use" approach favored by Judges

Williams, Silberman, and Buckley -- and the alternate approach that looks to concrete indicia of use to support inference of "use" (such as proof of an actual drug transaction at which the gun played a role) -- both provide objective ways to distinguish use from mere possession. Such an approach is crucial for separating cases where it was "*likely* [that the defendant] put the gun to active use" from cases where use was merely a "theoretical possibility." *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting) (emphasis in original).

B. The majority's "accessibility" test for determining whether a gun was used or carried "during and in relation to" a drug offense is also deeply flawed. The premise of the majority opinion is that any gun accessible to a drug offender "becomes a part of the drug activity and thus is used by the defendant in relation to the drug activity." App., *infra*, 10a. That rationale swallows every case in which a drug offender possesses a firearm, because the existence of the firearm would necessarily make it "a part of the drug activity." Thus, if a person who possessed drugs with the intent to sell them used a gun *at any time for any purpose*, that use could be imputed to the drug offense. Although this Court held in *Smith* that the phrase "in relation to" is to be read broadly (113 S. Ct. at 2058), the consequences of the "accessibility" test are too broad. See *Long*, 905 F.2d at 1578 n.10 (Thomas, J.) ("A person can possess a gun without either 'using' it or using it 'during and in relation to' a given crime.").

C. It is a cardinal principle of statutory interpretation that a statute must be read as a whole because "[t]he meaning of statutory language, plain or not, depends on context." *Brown* v. *Gardner*, 63 U.S.L.W. 4035, 4036 (U.S. Dec. 12 1994) (No. 93-1128) (quoting *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Each term in a statute should be read in light of the surrounding words and provisions of the law as a whole, because that context illuminates the scope and meaning of each word within the statutory framework. *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 523 (1993). The broad interpretation of "use" by the court below violates those principles in two important respects.

1. The majority opinion's broad reading of "use" brings subsection (c)(1) of Section 924 into conflict with subsection (d). Subsection (c)(1) proscribes "use" of a firearm. By contrast, subsection (d) provides for forfeiture of firearms "used" in certain offenses *and* of firearms "intended to be used." Thus, Congress was "clearly quite alert to the distinction between firearms 'used' in commission of a crime and [firearms] merely 'intended' for such use." App., *infra*, 18a (Williams, J., joined by Silberman and Buckley, JJ., dissenting).

"It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) (internal quotation marks omitted); *Brown*, 63 U.S.L.W. at 4037. Congress chose to

include an "intent to use" element in subsection (d) but not to include such an element in subsection (c)(1). The "proximity" test," however, reads a "floating intent to use" (App., *infra*, 16a (dissent)) into subsection (c)(1) by permitting a finding of "use" if a gun has merely been kept in an accessible place for potential use. *Id.* at 10a. Including within "use" the possibility of future retrieval and employment of a gun "effect[ively] dilute[s] 'use' to mean simple possession" and rewrites subsection (c)(1). *Id.* at 16a (dissent).

This Court has ruled that "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)." *Smith*, 113 S. Ct. at 2057. Because subsection (d) distinguishes between "use" and the "intent to use," subsection (c)(1) should be construed to do so as well.

The court below offered no answer to this point made by Judge Williams' dissent. It is not clear what answer the court (or the government) *could* offer. The decision below, which ignores this critical point, is simply wrong.

2. The expansive definition of "use" in the opinion below also eclipses Section 924(c)(1)'s alternate element of "carrying" a firearm, and thus violates the tenet that each word in a statute must be given effect. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2210 (1993). Although the court declined to address the scope of "use" *vis-à-vis* "carry," its "proximity" test leaves no room for the separate application of the "carrying" element. See App., *infra*, 18a (Williams, J., joined by Silberman

and Buckley, JJ., dissenting) (the proximity test "giv[es] 'use' such a broad meaning as to leave no apparent role for 'carry'").

The majority opinion's "proximity" test is so expansive that all conduct that constitutes "carrying" a firearm would also be covered by "use." The plain meaning of the term "carry" is "[t]o have or keep on one's person (*carry a gun*)." Webster's II New Riverside University Dictionary 233 (1984) (emphasis in original). But, under the majority opinion's "proximity" test, any gun that is carried is necessarily also "used" because a firearm on one's person is sufficiently proximate to be considered "used." Even if "carry" is interpreted more broadly to include situations where a defendant's cohorts bear weapons,[6] such situations would also constitute "use."[7]

The majority opinion's broad reading of "use" renders the alternate element of "carry" redundant; that failing strongly suggests that the interpretation is erroneous. *Ratzlaf* v. *United States*, 114 S. Ct. 655, 659 (1994) (concern against treating

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[6] See *e.g.*, *United States* v. *Harrison*, 931 F.2d 65, 71 (D.C. Cir.) (Thomas, J.) (Section 924(c)(1) conviction affirmed where defendant's confederates each bore weapons), cert. denied, 112 S. Ct. 408 (1991); see also App., *infra*, 20a (Williams, J., joined by Silberman and Buckley, JJ., dissenting). In the present case, there were no cohorts involved.

[7] Several courts of appeals have articulated a "within reach" standard for determining whether a firearm was "carried." See, *e.g.*, *United States* v. *Joseph*, 892 F.2d 118, 126 (D.C. Cir. 1989) (firearm "no more than an arm's span" from the defendant); *United States* v. *Gunning*, 984 F.2d 1476, 1483 (7th Cir. 1993) (gun taken in car to drug sale "within * * * reach"); *United States* v. *Nicholson*, 983 F.2d 983, 990 (10th Cir. 1993) (gun in car "within easy reach"); see also App., *infra*, 20a (Williams, J., joined by Silberman and Buckley, JJ., dissenting).

statutory terms as surplusage is "heightened when the words describe an element of a criminal offense"). See also *United States* v. *Granderson*, 114 S. Ct. 1259, 1265 (1994) (congressional intent to "get tough on drug offenders" does not provide guidance on how specific statutory provisions are to be interpreted).

D. The majority opinion's interpretation of Section 924(c)(1) is erroneous for the additional reason that it "swallow[s] up" the sentencing guideline that specifically addresses drug-related gun possession. See *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting).

Section 924(c)(1) and Section 2D1.1(b)(1) of the Sentencing Guidelines both impose extra punishment on armed drug offenders. But, whereas Section 924(c)(1) prescribes a "blunt 'mandatory minimum' for 'us[ing]' a firearm, the "more sophisticated sentencing guideline" metes out a punishment that "varies with the seriousness of the drug crime" for situations where a "firearm * * * was possessed" during a drug offense. *Id.* at 466-467. The danger, then, of affording too much latitude to Section 924(c)(1) is that the mandatory minimum sentence will nullify the calibrated sentencing scheme promulgated under the Guidelines.

> In this instance, one relevant statute, the statute creating the Sentencing Guidelines, reflects a major congressional effort to create a fairly sophisticated * * * system that distinguishes among different kinds of criminal behavior and punishes accordingly. The other statute, the mandatory minimum statute, represents an ad hoc deviation from that more general policy. Given the importance (to Congress) of the Guidelines system, * * * *courts should take care not to interpret other statutes * * * with unnecessary breadth.*

Id. at 467-468 (emphasis added).

The D.C. Circuit's new interpretation of "use" in the opinion below takes no such care, and its "proximity" standard serves only to exacerbate the conflict with the Sentencing Guidelines. Such tension, moreover, is completely unnecessary: when the "use" requirement is governed by its "ordinary," "active" meaning (*McFadden*, 13 F.3d at 467 (dissent)), it complements rather than supplants the sentencing guideline penalizing "possession."

E. Finally, the opinion below runs roughshod over the rule of lenity. As this Court observed last Term, "where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States* v. *Granderson*, 114 S. Ct. at 1267. Whatever else may be said of the government's position and of the position adopted by a bare majority of the court below, it would be farcical to claim that the position is "unambiguously correct." The court below did not so claim; rather, it simply chose to ignore the rule of lenity. But the rule of lenity has a role to play in these difficult Section 924(c)(1) cases, and this Court should grant review and apply the rule of lenity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1994

APPENDICES

UNITED STATES of America

v.

Roland J. BAILEY, Appellant.

UNITED STATES of America

v.

Candisha Summerita ROBINSON a/k/a Candysha Robinson, Appellant.

Nos. 90-3119, 92-3062.

United States Court of Appeals, District of Columbia Circuit.

Argued In Banc March 30, 1994.

Decided Oct. 4, 1994.

Defendants were separately convicted in the United States District Court for the District of Columbia, Stanley S. Harris and Aubrey E. Robinson, Jr., JJ., of drug offenses, and they appealed. Different panels of the Court of Appeals affirmed, 995 F.2d 1113, and reversed, 997 F.2d 884, defendants' respective convictions of use of firearm during and in relation to drug-trafficking crime. Cases were consolidated for en banc reconsideration. The Court of Appeals, Ginsburg, Circuit Judge, held that: (1) sufficiency of evidence test henceforth would be whether there is evidence that firearm in question was in proximity to drugs, drug paraphernalia, or drug proceeds and was accessible to defendant from site of drugs, drug paraphernalia, or drug proceeds involved in predicate drug-trafficking offense, and (2) evidence was sufficient to support both defendants' convictions.

Affirmed.

Wald, Circuit Judge, filed dissenting opinion.

Stephen F. Williams, Circuit Judge, filed dissenting opinion, in which Silberman and Buckley, Circuit Judges, joined.

Silberman, Circuit Judge, filed separate dissenting opinion.

1. Weapons ⇐4, 6

Mere possession of firearm by someone who commits drug offense does not amount to offense of using or carrying firearm in relation to drug-trafficking crime; instead, firearm must have some purpose or effect with respect to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

2. Courts ⇐89

Due regard for value of stability in law requires court to have good and sufficient reason to reject established law at later date.

3. Courts ⇐90(4)

Court reconsiders its own prior construction of statute somewhat gingerly because, unlike in context of constitutional interpretation, Congress remains free to alter what court has done.

4. Weapons ⇐4

Rejection of established circuit precedent creating multifactor, open-ended test for determining whether firearm was used in relation to drug-trafficking crime was warranted by fact that established test impermissibly intruded into province of jury, produced widely divergent and seemingly contradictory results, and conflicted with standards adopted in other circuits. 18 U.S.C.A. § 924(c)(1).

5. Criminal Law ⇐1144.13(5)

On appeal from general verdict finding defendant guilty, deference owed to trier of fact requires reviewing court to draw from record all inferences that can justifiably be drawn in support of conviction.

6. Weapons ⇐17(5)

Whether gun was used during and in relation to drug-trafficking offense is question of fact to be settled by trier of fact, who would be accorded deference on appeal. 18 U.S.C.A. § 924(c)(1).

7. Weapons ⇐4

Defendant "uses" gun, for purposes of offense of using firearm during and in relation to drug-trafficking crime, whenever defendant puts or keeps gun in particular place from which defendant or defendant's agent can get access to it if and when needed to

facilitate drug crime. 18 U.S.C.A. § 924(c)(1).

See publication Words and Phrases for other judicial constructions and definitions.

8. Weapons ⇐4

In case where predicate offense involves distribution of drugs, government must show that defendant had gun in such place at time that drugs were being distributed to establish that defendant "used" gun during and in relation to offense. 18 U.S.C.A. § 924(c)(1).

See publication Words and Phrases for other judicial constructions and definitions.

9. Weapons ⇐4

In case where predicate offense is possession with intent to distribute drugs, government need not prove that gun was in that place during entire period that defendant illegally possessed drugs or that it was in that place at time that defendant was arrested, to establish that defendant "used" gun during and in relation to predicate offense; because possession with intent to distribute is continuing offense, government need prove only that defendant put or kept gun in that place at some point while defendant illegally possessed drugs. 18 U.S.C.A. § 924(c)(1).

10. Weapons ⇐4

Using gun to protect one's drugs, drug paraphernalia, or proceeds of one's drug sales is clearly prohibited use of gun, for purposes of offense of using firearm in relation to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

11. Weapons ⇐4

Positioning firearm in such a way that it protects or is otherwise integrated into one's drug trafficking amounts to use of gun in relation to drug-trafficking offense. 18 U.S.C.A. § 924(c)(1).

12. Weapons ⇐17(2)

Whenever there is sufficient evidence for jury to find that defendant at some time during commission of predicate drug offense put or kept firearm in place where it would be proximate to and accessible from place that is clearly connected to his drug trafficking, jury may also infer that gun was being used to protect drug-trafficking operation, and was therefore being used in relation to drug-trafficking offense; jury may draw this inference regardless of whether predicate offense is one of drug distribution or possession with intent to distribute drugs. 18 U.S.C.A. § 924(c)(1).

13. Weapons ⇐17(4)

Evidence that at time of arrest loaded pistol was found in trunk of defendant's car along with $3,216 in cash, and that 30 grams of cocaine was located elsewhere in car, supported jury's conclusion that defendant used gun during and in relation to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

14. Weapons ⇐17(4)

Evidence that firearm was found in locked trunk that also contained drugs underlying defendant's conviction for possession with intent to distribute supported jury's finding that defendant used gun during and in relation to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

15. Weapons ⇐17(4)

To survive challenge to sufficiency of evidence to support conviction for using firearm in relation to drug-trafficking crime, government need only point to evidence that firearm in question was in proximity to drugs, drug paraphernalia, or drug proceeds and was accessible to defendant from site of drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug-trafficking offense. 18 U.S.C.A. § 924(c)(1).

Appeal from the United States District Court for the District of Columbia (CR-89-00310-01, CR-91-00453-01).

James G. Duncan (appointed by the court) argued the cause and filed the briefs, for appellant Bailey.

David B. Smith (appointed by the court) argued the cause and filed the briefs, for appellant Robinson.

John R. Fisher, Asst. U.S. Atty., argued the cause for appellee. With him on the brief were Eric H. Holder, Jr., U.S. Atty., and Elizabeth H. Danello, Asst. U.S. Atty., Elizabeth Trosman, Odessa F. Vincent, Thomas C. Black, and William E. Lawler, III, Asst. U.S. Attys., entered appearances.

Before EDWARDS, Chief Judge, WALD, MIKVA,* SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Dissenting opinion filed by Circuit Judge WALD.

Dissenting opinion filed by Circuit Judge STEPHEN F. WILLIAMS, in which Circuit Judges SILBERMAN and BUCKLEY concur.

Separate dissenting statement filed by Circuit Judge SILBERMAN.

GINSBURG, Circuit Judge:

This consolidated case involves two separate challenges, one by appellant Roland Bailey and one by appellant Candisha Robinson, to their convictions under 18 U.S.C. § 924(c)(1). In relevant part, that section imposes a five-year term of imprisonment upon anyone who "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." We have long required that in order to support a conviction under § 924(c)(1), the government must demonstrate both a "nexus ... between a particular drug offender and the firearm," *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990), and that "the gun facilitate[d] the predicate offense in some way," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992). In order to assess whether the government has made the required showing, we have developed an open-ended test that takes account of numerous factors arguably relevant to whether a gun was used in relation to a drug trafficking offense. *See, e.g., United States v. Derr*, 990 F.2d 1330, 1338 (D.C.Cir.1993); *United States v. Morris*, 977 F.2d 617, 621-22 (D.C.Cir.1992). Applying this test, divided panels of the court affirmed Bailey's conviction, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir. 1993), and reversed Robinson's conviction, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993).

Because this complex, open-ended test has produced widely divergent results and because we believe that it intrudes the court into the province of the jury, we now replace it with a test that looks to two factors only: the proximity of the gun to the drugs involved in the underlying offense, and the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located. Applying that test, we affirm both convictions.

I. Background

In each of these cases, possession with the intent to distribute cocaine was the predicate drug offense in connection with which the defendant was charged with using or carrying a firearm in violation of § 924(c)(1). The facts of each case are briefly as follows.

A. United States v. Bailey

In May 1989, Roland Bailey was stopped by two Metropolitan Police officers after they noticed that the car he was driving had no front license plate and no inspection sticker. When Bailey failed to produce a driver's license, the officers ordered him out of the car. Before Bailey exited the car, the officers saw him push something between the seat and the front console. Upon searching the passenger compartment of the car they discovered one round of ammunition and 27 small plastic bags containing a total of 30 grams of cocaine. The officers then placed Bailey under arrest; the ensuing search of the trunk of his car turned up a loaded 9-mm. pistol and $3,216 in cash.

Bailey was charged with one drug offense and one other firearms offense in addition to using or carrying a firearm in violation of 18 U.S.C. § 924(c)(1). At trial, Detective Charles DiDomenico, a narcotics expert, tes-

* Then-*Chief Judge* Mikva, a member of the Court when these cases were argued *in banc*, took no part in the disposition.

tified that weapons such as Bailey's are frequently carried by drug dealers "not only to protect themselves, but [also] to protect their assets, drugs and money." Bailey was convicted by the jury on all charges and was sentenced by the court to two concurrent 51-month sentences of imprisonment on the drug and weapon charges not at issue here, and to a consecutive 60-month term of imprisonment on the § 924(c)(1) conviction.

B. United States v. Robinson

In June 1991, an undercover officer of the Metropolitan Police Department approached Veloria Robinson, the sister of appellant Candisha Robinson, and told her that he wanted to buy crack cocaine. Veloria then took him to an apartment in the northeast quadrant of the city. Candisha opened the door; Veloria told her that the officer wanted something. When Candisha asked what he wanted, he replied that he wanted a "twenty." He then entered the apartment and the Robinson sisters went into the bedroom. He saw Candisha hand Veloria a rock of crack cocaine, which Veloria then sold to him. The next evening, the officer made another controlled buy at the same apartment, this time from a man who claimed that he also lived there.

Shortly after the second controlled buy, a search warrant was executed at the apartment. Inside a locked trunk in the bedroom closet the police found a .22-caliber Derringer, appellant Robinson's 1990 tax return, a letter from her employer, 10.88 grams of crack cocaine, and the marked $20 bill from the first controlled buy. They also found a quantity of plastic baggies in the bedroom.

At trial, Detective David Stroud, a narcotics expert, testified that the Derringer was a "second gun"—that is, a type of gun that a drug dealer might hide on his person for use until he could get to his "real gun." Stroud also testified that drug dealers generally use guns to protect themselves from other drug dealers, the police, and their own employees.

Robinson was convicted by a jury on five separate drug counts as well as on the § 924(c)(1) charge. Including the 60-month term of imprisonment for violating § 924(c)(1), she was sentenced to 157 months of imprisonment, four years of supervised release, and a special assessment of $300.

C. The Appeals in Bailey and Robinson

Each defendant appealed his or her § 924(c)(1) conviction on the ground that the Government had failed to adduce sufficient evidence at trial that he or she had "used" or "carried" a firearm in relation to a drug offense. Different panels affirmed Bailey's conviction and reversed Robinson's, in each case over a dissent. Bailey and the government respectively suggested rehearing *in banc*. In order to resolve the apparent inconsistencies in our various decisions applying § 924(c), we consolidated the two cases and reheard them *in banc*.

II. Analysis

[1] Section 924(c)(1) states that:

> Whoever, during and in relation to any ... drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment for such ... drug trafficking crime, be sentenced to imprisonment for five years.

By requiring that the use of the firearm be "in relation to" a drug trafficking offense, the Congress made it clear that it did not intend to criminalize the mere possession of a firearm by someone who commits a drug offense. "[T]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, — U.S. —, — — —, 113 S.Ct. 2050, 2058–59, 124 L.Ed.2d 138 (1993). At the same time, it is clear that a firearm need not actually be brandished in order to be used or carried in connection with a drug trafficking offense. *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989). As Justice (then Judge) Kennedy wrote for the Ninth Circuit in the seminal opinion on § 924(c)(1):

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge occurred, then there is a violation of [the statute].

United States v. Stewart, 779 F.2d 538, 540 (9th Cir.1985) (internal citations omitted).

A. Section 924(c)(1) to Date

In an effort to distinguish between mere possession of and the use or carrying of a gun in connection with a drug trafficking crime, we held early on that more than just evidence of proximity was required to establish "that the gun supported the possession crime." *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C.Cir.1991). By the next year, we were able to state that "a number of factors" may be relevant in any particular case: "courts have identified and will [continue to] identify" such factors. *United States v. Morris*, 977 F.2d 617, 621 (D.C.Cir.1992). Just two years later Judge Wald summarized the development of our case law this way:

> [W]e have enumerated a nonexclusive set of factors to weigh in making that [distinction]. Among other things, we look to whether a gun is accessible to the defendant, whether it is located in proximity to the drugs (which may cut either way depending on the facts of a particular case), whether it is loaded, what type of weapon it is, and, finally, whether there is expert testimony to bolster the government's particular theory of "use."

Derr, 990 F.2d at 1338 (citing *Morris*, 977 F.2d at 621–22). Thus, in each case in which a defendant challenges the sufficiency of the evidence for his conviction under § 924(c)(1), we have weighed each bit of evidence against him in order to determine whether the defendant could be said to have used (or carried) his gun in furtherance of his drug crime.

Defendants Bailey and Robinson do not attack this open-ended (for convenience *Bruce–Morris–Derr*) approach in determining whether a gun was used during and in relation to a drug trafficking offense. Nor do they question the prior holding of this (and other) court(s) that a gun need not be brandished or displayed in order to be used or carried. Instead, each argues that if this approach were properly applied, he or she could not have been convicted based upon the evidence presented at trial. In response, the government argues that it needs to present evidence only that the defendant possessed a firearm and that the firearm in some way facilitated the drug crime; thus implicitly the Government asks us to abandon the *Bruce–Morris–Derr* approach in favor of a simpler test.

In form the dispute between the parties is little more than a disagreement over the evidence necessary to sustain a § 924(c)(1) conviction; neither side expressly addresses the question of how the disputed element of the crime, *viz.* "use," ought be defined. In substance, however, this case is about what constitutes use, as opposed to mere possession, of a firearm. Only when we have resolved that question can we determine the quantum of evidence necessary to convict and formulate an appropriate test for assessing whether the government has produced that evidence.

[2, 3] We granted rehearing in order to revisit these issues in the light of our experience using the *Bruce–Morris–Derr* approach. We do so bearing in mind that because the *Bruce–Morris–Derr* approach represents the established law of the circuit, a due regard for the value of stability in the law requires that we have good and sufficient reason to reject it at this late date. *See McKinney v. Pate*, 20 F.3d 1550, 1565 n. 21 (11th Cir.1994) (*in banc*) (noting that although "the implications of *stare decisis* are less weighty" when an *in banc* court reviews an issue for the first time, "*stare decisis* is a hallmark of our judicial system" and should still be considered by the court *in banc*). In particular, we reconsider our own prior construction of a statute somewhat gingerly as well because " 'unlike in the context of constitutional interpretation ... Congress remains free to alter what we have done.' " *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 875 (D.C.Cir.1992) (*in banc*) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (internal citations omitted)); *see also Cottrell v. Commissioner*, 628 F.2d 1127, 1131 (8th Cir.1980) (*in banc*) ("The doctrine of *stare decisis*, weighty in

any context, is especially so in matters of statutory construction.").

We have nonetheless identified at least three factors that justify rejecting established precedent. First, the *in banc* court may properly overrule a prior panel decision if "it decides that the panel's holding on an important question of law was fundamentally flawed." *Critical Mass Energy Project*, 975 F.2d at 876. In this regard, we conclude below that the open-ended *Bruce–Morris–Derr* approach impermissibly intrudes into the province of the jury. Second, when "a precedent [is] a positive detriment to coherence and consistency in the law ... because of inherent confusion created by an unworkable decision," the court is justified in overruling that precedent. *Patterson*, 491 U.S. at 173, 109 S.Ct. at 2371. In this case, even a brief survey of our decisions demonstrates (below) that the *Bruce–Morris–Derr* approach has produced and will likely continue to produce inconsistent results. Finally, the *in banc* court may overrule a prior precedent interpreting a statute "if it finds that other circuits have persuasively argued a contrary construction." *Critical Mass Energy Project*, 975 F.2d at 876. Again, a survey of the other circuits (also below) demonstrates that they have uniformly adopted a standard different from ours and one that seems more conducive to consistent application.

[4] Preliminarily, therefore, we survey the problems inherent in the *Bruce–Morris–Derr* approach: intrusion into the province of the factfinder, seemingly inconsistent results, and a continuing conflict with the interpretation of § 924(c)(1) adopted by virtually every other circuit.

1. The Province of the Jury

[5] It is a cardinal principle of our system of criminal law that the facts are settled by the trier of fact, be it a jury or a judge, and are not ordinarily to be redetermined by a reviewing court. On appeal from a general verdict finding a defendant guilty, the deference we owe to the trier of fact requires that we draw from the record all inferences that can justifiably be drawn in support of the conviction. Hence, in assessing the sufficiency of the evidence, as an appellate court we must ask not "whether [we] believe[ ] that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment was supported by substantial evidence." *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362 (1966). Or, as the Supreme Court said in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789 (emphasis in original); *see also United States v. Long*, 905 F.2d 1572, 1576 (D.C.Cir. 1990) ("A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation").

[6] Whether a gun was used during and in relation to a drug trafficking offense is, at its core, a question of fact. In a case where the gun was not actually fired or brandished during the commission of the crime, it may well be an ultimate rather than a basic fact, but it is still a question of fact and not of law. Of course, an appellate court may properly determine, as a matter of law, the baseline or minimum conduct that can constitute a "use," and it must determine in each case, with appropriate deference to the jury, whether the record contains sufficient evidence of such conduct. The reviewing court does not sit, however, to make its own finding with respect to an ultimate fact. Weighing the evidence is a function assigned to the jury: "We are not a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant." *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990). Yet the use of an approach that requires the court to weigh numerous factors and to determine the specific relevance of individual facts in order to assess the sufficiency of the evidence invites the court to do just that.

The *Bruce–Morris–Derr* approach strips from the jury its "responsibility [as] the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw

reasonable inferences from basic facts to ultimate facts." *Jackson*, 307 U.S. at 319, 99 S.Ct. at 2789. For example, in *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), we were at considerable pains to determine whether a small gun found in the pocket of a coat along with a stash of drugs "was intended for use only at the time of distribution" or was rather "the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Id.* at 1055. Determining that the former was more likely true, we reversed the conviction. *See id.* at 1056. Similarly, in *Derr* and *Robinson*, the panel struggled to determine for itself the significance of the fact that the defendant's gun was locked respectively in a closet or trunk with a stash of drugs at the time of the defendant's arrest. *See Robinson*, 997 F.2d at 888; *Derr*, 990 F.2d at 1338. Determining the weight to be given a single piece of evidence is not ordinarily an appropriate function for an appellate court.

A due regard for the limits that the jury system necessarily places upon the scope of our review would not lead us to abdicate all our responsibility as an appellate court—for example by affirming any conviction in which a gun is found and there is some connection, no matter how speculative or remote, between the gun and the predicate drug offense. A jury may convict a defendant for any of a number of impermissible reasons, and therefore, if the defendant claims that the evidence against him is insufficient to sustain his conviction, we must as an appellate court review the record conscientiously. *See United States v. Zeigler*, 994 F.2d 845, 849 (D.C.Cir.1993). Nor does our recognition that the approach heretofore used in this circuit impinges upon the province of the jury by itself predetermine precisely how we ought to review a § 924(c)(1) case. It does, however, strongly suggest that we must replace the open-ended *Bruce–Morris–Derr* approach with a manageable standard; we must, that is, state clearly the minimum showing that the government must make in order to put to the jury the question whether a defendant has violated § 924(c)(1).

2. Inconsistent Results

The open-ended approach described in *Derr* has produced widely divergent and seemingly contradictory results. Panels have upheld convictions where a loaded, sawed-off shotgun was found along with crack cocaine and drug paraphernalia in a lawn clipping bag beneath the exterior stairwell of a house and additional drugs and paraphernalia were found in the defendant's bedroom, *see United States v. Jefferson*, 974 F.2d 201 (D.C.Cir.1992); where loaded pistols were found underneath a sofa cushion and on a bedroom nightstand in the defendant's house, which elsewhere contained crack cocaine in ziplock bags and other drug paraphernalia, *see United States v. Morris*, 977 F.2d 617 (D.C.Cir.1992); and where a loaded 9–mm. pistol was found along with cash in the trunk of the defendant's car after bags of cocaine had been found in the front seat of the car, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir.1993). In contrast, panels have reversed convictions where a loaded .22 caliber Derringer was found, along with individual packages of cocaine and marijuana, in a pocket of the defendant's trench coat in the house in which he lived, *see United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991); where an unloaded .357 Magnum revolver was found along with the defendant's birth certificate and a locked box containing cash, crack cocaine, and drug paraphernalia in an apartment in which the defendant was staying, *see United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993); and where an unloaded .22 caliber Derringer was found in a closet along with crack cocaine and drug proceeds, including marked money, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993). Although each of these cases can be distinguished on the basis of one or another fact—for example, by looking to the type of gun involved or to how easily the defendant could have grabbed the gun at the time that he was arrested—such distinctions seem counter-intuitive if not arbitrary. Having reflected upon our experience, we think it apparent that the court has failed to take a consistent approach because it has not laid down a standard that yields determinate results in any but the easiest of cases.

3. Conflict with Other Circuits

No other circuit has found our open-ended approach persuasive. Our sister circuits have each adopted a definition of "use" that is considerably broader than firing, displaying, or otherwise brandishing the firearm. They focus upon whether the evidence concerning the location of the gun is sufficient to permit the jury to conclude that the gun in some way facilitated the predicate drug trafficking offense. From a functional perspective, the standards they have developed for assessing the sufficiency of the evidence are much more similar to the "proximity and accessibility" standard we adopt today than to the open-ended approach that we have used in the past.

The opinion in *United States v. Molinar-Apodaca*, 889 F.2d 1417 (5th Cir.1989) is representative. In that case, police officers executing a search warrant had found a commercial quantity of marijuana in a shed outside the defendant's house; in the house itself, they found an automatic rifle and a semi-automatic handgun. *Id.* at 1422. In analyzing the defendant's challenge to the sufficiency of this evidence, the Fifth Circuit did not look at such details as whether the guns were loaded or whether they were the appropriate type of weapon to protect an ongoing drug operation. Rather, applying circuit law to the effect "that the government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking," the court affirmed the conviction.

In the wake of Justice Kennedy's analysis in *Stewart*, the Ninth Circuit applies an equally straightforward test. That court will affirm a conviction under § 924(c)(1) "if [the firearm's] physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest." *United States v. Torres-Medina*, 935 F.2d 1047, 1050 (9th Cir.1991).

Every other circuit similarly focuses, in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense. In numerical order by circuit, *see, e.g., United States v. Paulino*, 13 F.3d 20, 26 (1st Cir. 1994) ("[T]he court's critical concern should ... be whether ... [the firearm] was 'available for use' in connection with the narcotics trade"); *United States v. Medina*, 944 F.2d 60, 66 (2d Cir.1991) (holding that a conviction may be affirmed "where circumstances indicate that the defendant intended to use the weapon by strategically placing it so that it could be available for use during a drug transaction"); *United States v. Hill*, 967 F.2d 902, 906–07 (3d Cir.1992) (holding that where the proximity of the gun to the drugs indicated that the defendant's "access to the weapon was unimpeded by distance or other objects," the jury could conclude that the weapon "facilitated [the defendant's] possession of and intention to distribute" illegal drugs); *United States v. Paz*, 927 F.2d 176, 179 (4th Cir. 1991) (affirming a conviction because, during the course of defendant's possessory offenses, "the gun was present and accessible, even though under a mattress"); *United States v. Thomas*, 12 F.3d 1350, 1362 (5th Cir.1994) ("The presence of firearms at the home of a defendant where drugs, money, and ammunition are also found ... is sufficient to establish the 'use' of a firearm as an integral part of a drug-trafficking crime in violation of § 924(c)(1)"); *United States v. Warner*, 10 F.3d 1236, 1239 (6th Cir.1993) (affirming a conviction solely because the firearm was "readily accessible for drug-related protection"); *United States v. Vasquez*, 909 F.2d 235, 240 (7th Cir.1990) (holding that a conviction under § 924(c)(1) is appropriate when guns and drugs are present in the same location, because the "trier of fact [can] reasonably conclude that the availability of firearms instills [in the defendant] a heightened sense of security [while] he posses[es] the drugs with the intent to distribute them"); *United States v. Quintanilla*, 25 F.3d 694, 700 (8th Cir.1994) ("To support a conviction under section 924(c)(1), the government need only establish that a firearm was present and available for use"); *United States v. Torres-Medina*, 935 F.2d 1047, 1050 (9th Cir.1991) ("We hold that a firearm may be considered available [and therefore used by a defendant] for purposes of section

924(c)(1) if its physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest"); *United States v. McKinnell*, 888 F.2d 669, 675 (10th Cir.1989) (holding that "the uses element of section 924(c)(1) is satisfied when the defendant has ready access to the firearm and the firearm was an integral part of his criminal undertaking and its availability increased the likelihood that the criminal undertaking would succeed" (internal quotation marks omitted)); *United States v. Poole*, 878 F.2d 1389, 1393 (11th Cir.1989) ("[P]ossession of a firearm constitutes use in relation to the drug trafficking offense if the possession is an integral part of, and facilitates the commission of, the drug trafficking offense"); *see also* Note, *Smith v. United States and the Modern Interpretation of 18 U.S.C. 924(c)(1): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L.REV. 815, 843 & nn. 187–190 (1994) (noting that "other circuits have specifically rejected many of the factors considered by the D.C.Circuit: size of the gun ... whether the firearm was loaded, number of weapons, and evidence of past actual use"). *But cf. United States v. Taylor*, 18 F.3d 55, 58 (2d Cir.1994) (noting that the analysis of a sufficiency challenge "is clearly a very fact-intensive question [that] requir[es] a careful examination of, among other things, where the gun was located and what else was found in the apartment").

B. Section 924(c) Henceforth

As the Supreme Court has made clear, the government must make two distinct showings in order to obtain a conviction under § 924(c)(1): "that the defendant 'use[d] or carrie[d] a firearm' " and "that the use or carrying was 'during and in relation to' " a predicate offense. *Smith v. United States*, — U.S. —, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Therefore, in determining what the proper standard should be, we must determine both what constitutes the use or carrying of a gun and in what circumstances such a use or carrying is in relation to a drug trafficking offense.

1. "Use" of a Firearm

In the context of § 924(c)(1), "use" could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking. The narrow definition has the virtue of simplicity; it is, after all, relatively easy to determine whether the defendant's firing, brandishing, or displaying a gun was related to the defendant's contemporaneous (recall the "during" requirement of § 924(c)(1)) drug trafficking offense. The narrow definition also has the vice of simplicity, however; it is too narrow to capture all of the various uses of a firearm that the Congress apparently intended to reach via § 924(c)(1).

Certainly nothing in the statute indicates that the Congress intended to exclude any use from the scope of its prohibition. Indeed, the Supreme Court has said that in § 924(c)(1), the "Congress employed the term 'use' expansively." *See Smith*, — U.S. at —, 113 S.Ct. at 2058. Wherefore, it held that the statute prohibits the "use" of a firearm even as an object that can be bartered for drugs. *See Smith*, — U.S. at —, —, 113 S.Ct. at 2055, 2057.

Like firing, brandishing, or displaying a gun, barter involves handling the gun. A gun can surely be used even when it is not being handled, however. For example, a gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun "used" for domestic protection.

This more inclusive understanding of "use" has long been recognized in the jurisprudence of the Supreme Court. In *Astor v. Merritt*, 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884), the Court was required to interpret a customs statute that exempted from duty "[w]earing apparel in actual use ... of persons arriving in the United States." *Id.* at 203, 4 S.Ct. at 413. The petitioner sought an exemption for clothing that he and his family had purchased abroad, but not yet worn. The Court accepted his argument:

> If a person residing in the United States should purchase wearing apparel here, in a

condition ready for immediate wear without further manufacture, intended for his own use or wear, suitable for the immediately approaching season of the year, and not exceeding in quantity, quality or value the limit above mentioned, no one would hesitate to say that such wearing apparel was 'in actual use' by such person, even though some of it might not have been actually put on or applied to its proper personal use.... An article of wearing apparel, bought for use, and appropriated and set apart to be used, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards.

Id. at 213, 4 S.Ct. at 419. Likewise, in *Smith*, the Court noted with approval the following definition of the verb "to use": " '[t]o make use of; to convert to one's service; to avail oneself of; to utilize; to carry out a purpose or action by means of.' " *Id.* — U.S. at ——, 113 S.Ct. at 2054 (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).

[7-9] In the context of § 924(c)(1), therefore, we hold that one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime. In a case where the predicate offense involves the distribution of drugs, the government must show that the defendant had the gun in such a place at the time that the drugs were being distributed. In a case when the predicate offense is possession with the intent to distribute drugs, however, the government need not prove that the gun was in that place during the entire period that the defendant illegally possessed the drugs or that it was in that place at the time that the defendant was arrested. Because possession with the intent to distribute is a continuing offense—that is, an offense that extends through time—the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs.[1]

2. "During" and "In Relation To"

[10] Once it is determined that the defendant has used or carried a gun, the more difficult question is whether he has done so "in relation to a drug trafficking offense." As the Court noted in *Smith*, this requirement "at a minimum, means that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." — U.S. at ——, 113 S.Ct. at 2059. For the statute to be violated, therefore, the gun "must 'facilitat[e] or ha[ve] the potential of facilitating' the drug trafficking offense." *Id.* (quoting *Stewart*, 779 F.2d at 540) (alterations in original). Using a gun to protect one's drugs, drug paraphernalia, or the proceeds of one's drug sales is therefore clearly a prohibited use of the gun. Our prior decisions under § 924(c)(1) recognize as much.

The First Circuit refers to this relationship quite generally as a "facilitative nexus." That court looks only to whether the gun was "kept [where it was] to be available for use" in an ongoing drug offense. *See, e.g., United States v. Paulino*, 13 F.3d 20, 26 (1st Cir. 1994). The court's rationale is readily explained: once a person acquires a firearm and puts or keeps it where it can be used more actively in his drug activity, that firearm becomes a part of the drug activity and thus is used by the defendant in relation to the drug activity. It matters little whether the use is described in terms of emboldening

1. Invoking *United States v. Ray*, 21 F.3d 1134 (D.C.Cir.1994), and the Solicitor General's brief in *McLaughlin v. United States*, 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the dissent proposes that one may "use" a firearm in connection with a drug trafficking offense only by displaying it or, if the weapon is concealed, by threatening to use it. Judge Williams' Dissenting Opinion pp. 123 - 25. This ignores that how one "uses" a weapon in a crime necessarily depends upon the nature of the crime. *Ray* and *McLaughlin* were aggravated bank robbery cases, interpreting 18 U.S.C. § 2113(d). Of course one must somehow threaten another with a dangerous weapon in order to commit that offense. But it is senseless to say the same of crimes involving possession of drugs. Those are furtive crimes. Stealth is essential to their success. If, as expected, the drugs are secreted, one should expect the firearm to be as well.

the defendant to commit the drug trafficking crime, *see, e.g., Stewart*, 779 F.2d at 540, protecting the defendant's possessory interest in his drugs, *see, e.g., United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990), or otherwise; any way one puts it, the firearm is being used as part of the drug activity. Therefore, like the First Circuit, we look to whether the gun was positioned so as to be available for use during ongoing drug activity in order to determine whether the use was within the scope of § 924(c)(1).

Note that in order to relate to a drug trafficking offense, the use of the gun need not actually have furthered the offense. As the Supreme Court said in *Smith*, the gun need only "[a]ve] the potential of facilitating" the drug trafficking offense. Indeed, the Supreme Court has consistently held that "[t]he ordinary meaning of the words ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.' " *Morales v. Trans World Airlines, Inc.*, — U.S. ——, ——, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)); *see also District of Columbia v. Greater Washington Board of Trade*, — U.S. ——, ——, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992) (noting that when the Congress uses the phrase "relates to," it has chosen " 'deliberately expansive' language" (quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987))). The Congress's use of that phrase here was clearly deliberate and an indication that it intended § 924(c)(1) to be a broad prohibition, reaching more than conduct that actively advances the underlying predicate drug offense.

The legislative history of § 924(c)(1) reveals that the Congress expressly retained the "in relation to" requirement in preference to a more restrictive "in furtherance of" requirement. One bill that passed the Senate as part of the legislative process that culminated in the enactment of the current version of § 924(c)(1) would have penalized "[w]hoever, during and in relation to any [one of a number of enumerated drug] felon[ies] ... uses a firearm, or carries a firearm in furtherance of such crime ..." 131 Cong.Rec. 18,155, 18,235 (July 9, 1985) (reprinting S.49, a predecessor bill, as passed by the Senate). The Bureau of Alcohol, Tobacco, and Firearms criticized this proposal, however. Referring to the then-current version of § 924(c)(1), it argued that because "existing law already requires that the carrying be 'in relation to' the underlying crime," the proposed bill would "weaken[ ] the existing mandatory penalty provision." 4 U.S.C.C.A.N. 1327, 1346 (1986). Therefore, the "in furtherance of" requirement was deleted. This suggests that the Congress carefully avoided any implication that it intended to narrow the relationship that must be shown between the gun and the predicate offense in order to support a conviction under § 924(c)(1).

[11] In sum, it is apparent that positioning a firearm in such a way that it protects or is otherwise integrated into one's drug trafficking is not just a use of that gun, but is a use of that gun in relation to a drug trafficking offense and is therefore covered by the statute. What, then, is sufficient evidence that a gun found at the scene of a drug crime is being used in this way?

[12] Whenever there is sufficient evidence for a jury to find that the defendant at some time during the commission of the predicate drug offense put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions), the jury may also infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1). We emphasize that the jury may draw this inference regardless whether the predicate offense is one of drug distribution or of possession with intent to distribute drugs; we reject any suggestions to the contrary in our prior opinions. *Cf. Bruce*, 939 F.2d at 1055 ("Since possession with intent subsequently to distribute is in a sense a passive crime, it becomes somewhat difficult analytically to determine how one goes about using a gun in

relation to that crime"). As the Eighth Circuit has stated:

> It has become common knowledge that drug traffickers typically keep firearms available to protect themselves and their drugs and drug money. The presence and the availability of the firearms are often crucial to the "success" of the drug enterprise. It is therefore permissible for juries to infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)(1).

United States v. Young-Bey, 893 F.2d 178, 181 (8th Cir.1990).

Obviously, a defendant is free to present evidence that he possessed the gun solely for a different purpose—for example, as part of a collection of guns that just happened to be kept in a place that later became involved in drug trafficking. *See, e.g., United States v. Vincent*, 20 F.3d 229, 234–35 (6th Cir.1994) (noting that defendant had argued that he was a gun collector); *United States v. Morrow*, 923 F.2d 427, 435 (6th Cir.1991) (noting that defendant had "strenuously argued at trial that the only purpose for the gun was to shoot snakes"). It will be the duty of the trier of fact, however, and emphatically not of this court, to weigh all such evidence and to determine whether, as a matter of fact, the weapon was being used as part of a drug trafficking operation.

This test for use is not only an accurate means of ensuring that the scope of § 924(c)(1) is as broad as the Congress intended it to be; it will also avoid the problems with the *Bruce-Morris-Derr* approach that we outlined above. First, as we have already noted, placing or keeping a gun in such a way that it protects a drug trafficking operation is clearly a "use" of a gun "in relation to a drug trafficking offense." In most cases, the gun's proximity to and accessibility from the actual site of the defendant's drug trafficking will be the most probative evidence that the defendant was using the firearm to protect his drug trafficking. Similarly, whether the defendant carried the gun with, or to or from the location of, the drugs will be the most probative evidence that he carried it during and in relation to a drug trafficking offense. Second, this test can be readily administered both by the district court, which must determine whether the Government's case may go to the jury, and by the appellate panel that must determine whether the evidence was sufficient to support a conviction under § 924(c)(1). As such, it will assure greater uniformity across cases while penalizing more precisely the conduct that the Congress intended to reach.

C. *Application of the Standard*

[13] Applying the standard for "use" to the present cases, we hold that the Government presented sufficient evidence to convict both Bailey and Robinson. When Bailey was arrested, there were 30 grams of cocaine, more than $3,200 in cash, and a loaded 9–mm. pistol in his car. He was properly convicted of possession with the intent to distribute the cocaine. Because the gun was found in the same place as the cash (namely, the trunk) and in the same car as the drugs that formed the basis of his drug trafficking conviction, the jury was entitled to infer that the money was the proceeds of an ongoing drug operation. The requirements of proximity and accessibility were both satisfied. The gun was proximate to the drugs and was easily accessible to Bailey at any time that he was handling either the drugs or the proceeds of their sale. The jury could reasonably infer that Bailey had intentionally incorporated the gun into his drug operation, was using it as part of that operation, and was therefore using it in relation to his possession with intent to distribute the drugs. Although the record does not demonstrate that Bailey had made a specific drug sale (the amount of money he had notwithstanding), there is little reason to doubt that he was using the gun in relation to the possessory offense regardless whether the gun actually furthered the possessory offense or emboldened him to commit that offense. It is enough that the jury was entitled to conclude that Bailey had put the gun into the car not for some unrelated purpose but because he was keeping drugs there; that alone establishes that the gun was used in relation to Bailey's drug trafficking offense. We therefore affirm his conviction.

[14] The same analysis requires that we affirm Robinson's conviction. In her case, the firearm was found in the same locked trunk as were the drugs that formed the basis of her conviction for possession with intent to distribute. Again, the requirements of proximity and accessibility are obviously satisfied: The gun was proximate to the drugs, and it was accessible to anyone, such as Robinson, who had access to the drugs. Because the jury found beyond a reasonable doubt that the drugs were Robinson's—a finding not at issue here—it could also infer from these facts that Robinson placed or kept the gun in the same location as the drugs in order to protect her possession of the drugs. Hence, the jury was entitled to conclude that Robinson used the gun in relation to the drug trafficking offense.

III. Conclusion

[15] In sum, we reject the open-ended *Bruce-Morris-Derr* approach and conclude instead that in order to survive a challenge to the sufficiency of the evidence for a conviction under § 924(c)(1), the Government need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense. When there is evidence of proximity and accessibility, we will affirm a conviction under § 924(c)(1). Because the government presented such evidence at the trials of both Bailey and Robinson, the judgments of conviction in each case are

Affirmed.

WALD, Circuit Judge, dissenting:

There are four reasons why I believe the majority's bright line test for determining whether a gun has been "used" to commit a drug offense is wrong. First: Although I agree that "use" under 18 U.S.C. § 924(c)(1) requires the government to show that the gun in some way "facilitated" the defendant's commission of the underlying drug offense, *see United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), the sticking point is what kind of evidence it takes to make that showing. The *Bruce-Morris-Derr* line of cases did not in that sense set forth any test or formula for making such a determination; rather, it provided only a list of potentially relevant factors, *i.e.*, the type of weapon involved, whether it was loaded, the presence of expert testimony to support the government's theory of "use," the proximity of the gun to the drugs, and the accessibility of the gun to the defendant. By focusing on only two of the factors—(1) proximity of guns to drugs, drug paraphernalia, or drug proceeds and (2) accessibility of the guns to the defendant from a place used to store drugs, drug paraphernalia, or drug proceeds—to the exclusion of any other relevant factors, the majority in my view diminishes rather than enhances the prospect of accurate assessment on a case-by-case basis as to whether the gun was used to facilitate the drug offense. Congress, it should be noted, created no statutory presumption that "use" automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so.

Rather than furnishing a clear and predictable guide for judges and juries, the majority's new "proximity and accessibility" test offers only a straightjacket from which judges must inevitably strain to escape, as they are confronted with a steady stream of new fact situations. But the circumstances at which they must look to justify any exception will almost certainly be the very factors mentioned in the much-maligned *Bruce-Morris-Derr* cases, *i.e.*, *United States v. Bruce*, 939 F.2d 1053, 1055–56 (D.C.Cir.1991), *United States v. Morris*, 977 F.2d 617, 621–22 (D.C.Cir.1992), and *United States v. Derr*, 990 F.2d 1330, 1338 (D.C.Cir.1993)—the size and type of the gun, whether it was loaded, and the presence or absence of ammunition. Succumbing to "certainty's siren call," the majority would prohibit a reviewing judge from looking at any of these factors in deciding whether there was enough evidence in a particular trial record to justify an inference that the defendant used the guns to facilitate the drug offense.

Second: Because the majority's ruling in this *in banc* decision will predictably be promptly reduced to new jury instructions, it seems passing strange to say that the proximity and accessibility test minimizes interference with jury discretion. *See* Opinion ("Maj.Op.") at 111 – 12. What the majority is actually doing is artificially limiting the factors that the jury may legitimately consider when determining whether a defendant "used" a firearm during and in relation to the underlying drug offense. In so doing it is impermissibly curbing the jury's discretion to consider the totality of circumstances that might be relevant to that fact-bound determination.

Third: The new test is not only unduly rigid, it is not even clear. I cannot fathom how the accessibility prong, as defined by the majority, will work, or what indeed it adds to the minimal proximity test. It seems that whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are being stored.* Op. at 115. Thus if the guns and drugs are found together in a locked strongbox and the defendant is miles away, under the majority's test, the guns are arguably accessible to the defendant from the place where the drugs are stored and are being "used" to facilitate the possession of the drugs. To state the proposition is to reveal its illogic. Under the statute it is the defendant who must use the gun, so it is the accessibility of the gun to him at the time of the drug offense charged that is relevant, not the accessibility of the gun to a phantom defendant who is positioned where the drugs are. This latter definition of accessibility makes no sense whatsoever. Indeed, the majority's peculiar definition of accessibility renders their "use" test much looser than that endorsed by several other circuits, which at least focus on whether the guns were proximate to the defendant as opposed to merely accessible from the place where the drugs, drug paraphernalia, or drug proceeds are stored. *See, e.g., United States v. Theodoropoulos,* 866 F.2d 587, 597–98 (3d Cir. 1989) (guns located in trash can on back porch of apartment not proximate enough to defendant to fit within § 924(c)); *United States v. McKinnell,* 888 F.2d 669, 675 (10th Cir.1989) ("use" element of § 924(c)(1) met when defendant had "ready access" to firearm, which was located within easy reach of defendant).

Fourth: In those cases like Bailey's that involve the distribution or actual possession of drugs, application of the new proximity and accessibility test or the old relevant factors approach of *Bruce–Morris–Derr* will not likely make much difference. But in the trickier cases where the crime being charged is possession with intent to distribute and the defendant himself is not in the immediate vicinity of the scene where the drugs and guns are found, the majority's test can produce a ridiculous result. This was the situation in *Derr* and *Robinson.* In *Derr,* 990 F.2d at 1332, and *Robinson,* 997 F.2d 884, 885 (D.C.Cir.1993), the defendant was not even in the same room as the unloaded guns, which were secreted along with the drugs in a locked place (closet in *Derr,* footlocker in *Robinson*). The crime was possession (constructive) with intent to distribute and the issue in both cases was whether the gun was being used to facilitate that possession. Although the majority would presumably find sufficient evidence to convict under § 924(c)(1) in both cases because the guns were proximate to the drugs and would have been accessible to each defendant once he or she reached the place where the drugs were being stored, I do not see how this result can be right. A defendant cannot have been "using" a gun to protect drugs when he was nowhere near the gun. A robber or competitor drug dealer who broke into the apartment would have been able to force the lock open without an iota of fear from the gun within because no one was there to use it.

I agree with Judge Williams that we must honor the ordinary meaning of words used by Congress, *see Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); section 924(c) requires us to ask whether the gun was used to commit the drug trafficking crime for which the defendant was convicted, not whether the gun might have been used at some past or future time to commit some other past or future drug trafficking crime. *See Bruce,* 939 F.2d at 1055. To answer the right question, the

jury and a reviewing court needs access to all relevant information in order to replicate the real life scenario involving the guns, the drugs, and the defendant so that it can then decide if the defendant was in fact using the gun to facilitate the drug offense. The majority effectively leaves out the defendant altogether in its streamlined test; unfortunately, in so doing it distorts the plain meaning of the law, dispenses with logic, and invades jury discretion as well.

Finally, while I find Judge Williams' narrower interpretation of "use" quite persuasive, I cannot go so far as to agree that an actor who has intentionally placed a gun within easy access of his person in order to guard or to distribute drugs is not using the gun to facilitate the drug offense unless he openly brandishes, displays, or makes verbal threats about the gun. Where evidence of ready access to a gun by the defendant guarding or distributing the drugs exists, I think the jury can fairly draw the inference that such access is an intrinsic part of the criminal drug trafficking act. But conversely, I do not, like the majority, think it a fair inference that where the defendant has no such ready access to the gun, but instead is shown merely to be in constructive possession of the drugs which are located near the gun but away from the defendant, he is nonetheless using the gun to facilitate his possession or distribution. That I believe to be the principal difference between the other dissenters and myself, since I agree with them that "use" involves activity of some sort by a defendant who is in the immediate vicinity of the weapon, and not mere placement of the weapon near the drugs. That difference, however, is of sufficient import so as not to allow me to subscribe to Judge Williams' bright line rule any more than the majority's. Bright lines have a place in our jurisprudence but primarily with respect to what third parties like policemen or citizens can do without running afoul of the law. They are distinctly less useful in telling juries or judges what kind of evidence will suffice to show that a defendant is guilty of a generic crime that can be committed against a thousand different factual backdrops.

Because I believe that there was sufficient evidence to support Bailey's conviction for use in relation to actual possession of drugs with intent to distribute, *i.e.,* the gun in the trunk of the car was readily accessible to protect the drugs in the passenger compartment, but not Robinson's, *i.e.,* there was proof only of drugs and an unloaded gun in a locked trunk in a bedroom closet, I would affirm the first conviction and reverse the second. I would not adopt the majority's proximity and accessibility test but would instead continue to allow juries and judges to rely on all relevant factors to decide each case.

STEPHEN F. WILLIAMS, Circuit Judge, with whom SILBERMAN and BUCKLEY, Circuit Judges, join, dissenting:

Nearly all of our sister circuits say that mere possession of a firearm does not constitute "use" under 18 U.S.C. § 924(c). In the same breath, however, all—joined today by this court—allow conviction without evidence of the defendant's firing, brandishing, displaying or actively using the firearm in any way.[1] In joining the other circuits, the court undoubtedly simplifies our previous vague multifactored balancing test for review of § 924(c) cases for sufficiency of the evidence. And the majority is surely right that it is perfectly appropriate to overturn statutory interpretations where, as here, the precedent rejected is "fundamentally flawed", *Critical Mass Energy Project v. NRC,* 975 F.2d 871, 876 (D.C.Cir.1992) (en banc), and of course especially where, again as here, the precedent acts as "a positive detriment to coherence and consistency in the law ... because of inherent confusion created by an unworkable decision". *Id.* (quoting *Patterson v. Mc-*

1. Maj. Op. at 113 – 14. For a representative sampling, see *United States v. McFadden,* 13 F.3d 463, 465 (1st Cir.1994); *United States v. Breckenridge,* 782 F.2d 1317, 1322–23 (5th Cir.1986); *United States v. Lyman,* 892 F.2d 751, 753 (8th Cir.1989); *United States v. Harmon,* 996 F.2d 256, 258 (10th Cir.1993); *United States v. Poole,* 878 F.2d 1389, 1393 (11th Cir.1989). Other circuits are more honest. *United States v. Meggett,* 875 F.2d 24, 28 (2d Cir.1989) ("mere possession of a gun can constitute use"); *United States v. Torres-Rodriguez,* 930 F.2d 1375, 1385 (9th Cir.1991) (same).

Loan Credit Union, 491 U.S. 164, 173, 109 S.Ct. 2363, 2371, 105 L.Ed.2d 132 (1989)). In recent years, our cases have produced such inconsistency largely because we have failed to identify a clear definition of the term "use" of a firearm; it is that failure that has led to our frequent second-guessing of juries. In attempting to mend the incoherence of our previous approach by articulating a "proximity" plus "accessibility" test, however, the court has in effect diluted "use" to mean simply possession with a floating intent to use. In all but the rarest case, then, a defendant will be subject to punishment under § 924(c) if guilty of a drug trafficking offense and, while committing the offense, was in possession of a firearm. I think the wording, history and context of § 924(c) call for a different bright-line rule—one requiring active "use" rather than possession with a contingent intent to use.

* * * * * *

Section 924(c) imposes five additional years of punishment on

> Whoever, during and in relation to any crime of violence or drug trafficking crime ... *uses* or carries a firearm.

18 U.S.C. § 924(c)(1) (emphasis added).

The word "use" in ordinary language normally implies activity. Cf. *United States v. McFadden*, 13 F.2d 463, 467 (1st Cir.1994) (Breyer, J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' ... connote activity beyond simple possession"). The majority asserts that a gun placed in one's drawer with an intent to use it in the event of an intruder is "in common parlance, [ ] a gun 'used' for domestic protection". Op. at 114. This is possible in some contexts, but they are contexts in which the fact of "use" is *assumed*. Q: "What do you use the gun for?" A: "I use it to protect my family." In that hypothetical the answerer accepts the questioner's premise that the gun is in some sense used. But as the question assumes something that is not established, the answerer might well go back to the premise: A: "Actually, I've never had to use it. I keep it here in case of an intruder."

In support of its sweeping idea of the plain meaning of "use", the majority cites *Astor v. Merritt*, 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884). The case illustrates the importance of context. The plaintiff, William Astor, sought a refund of customs duties of $1,880 (in 1878 dollars) paid on clothing he had purchased in Europe for personal use but had not yet worn at the time he reentered the United States. The statute provided an exemption for "[w]earing apparel in actual use and other personal effects (not merchandise), ... of persons arriving in the United States", *id.* at 203, 4 S.Ct. at 413 (citing § 2505 of the Revised Statutes, p. 489, 2d ed.), and the government had prevailed below by arguing that "actual use" required that each particular item of clothing have been worn before importation. The Court instead found that the term "actual use" must be read in light of the basic distinction drawn by the statute between articles that are "personal effects of [the traveller], and not merchandise, and not for sale," *id.* at 214, 4 S.Ct. at 419, and thus sought a meaning for "actual use" that, "while it comports with the ordinary habits of passengers and travellers, will not open the door for fraud." *Id.* Any meaning that required past wearing was plainly incompatible with that purpose. No such incompatibility with statutory purpose is created by reading "use" in § 924(c) to require some sort of active use, as opposed to simple possession with a view to possible future use. Aside from *Astor*'s emphasis on context, its expansive interpretation of the word "use" to protect travellers hardly raises the same issues as does an expansive interpretation of a term in a criminal statute.

Part of that context consists of § 924(c)'s origins. The initial version, passed in 1968, reads as follows:

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Pub.L. No. 90-351, 82 Stat. 233 (1968). In its 1968 form, the statute suggests that Congress had active employment of a weapon in mind. The phrase "uses *to commit*" implies that the defendant derived actual service from the weapon in completing an unlawful act. This service might take the form of injuring one's opposition by firing it, intimidating opponents by displaying or brandishing it, or offering it in exchange to complete an unlawful commercial transaction. It does not, however, imply merely potential service—i.e., keeping it hidden from view, intending to use it only if a contingency should arise. For the gun in that instance has not actually been used to commit the crime; its only function is to make successful completion more probable under contingencies that have not arisen.

In 1984, Congress made two basic changes: it raised the sentence enhancement to exactly five years and it both broadened and narrowed the scope of predicate offenses from "any felony" to "any crime of violence". At the same time, it collapsed the two clauses into one, substituting the phrase "during and in relation to" the predicate crimes for the earlier provisions linking the firearm to the predicate crimes. The statute then read:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub.L. No. 98-473, 98 Stat. 2138 (1984). Congress gave two reasons for rewriting the statute, neither of which pertained to the scope of the term "use" or "carry". S.Rep. No. 225, 98th Cong., 2d Sess. 1, 312-13, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490-91 ("Part D of title X represents a complete revision of subsection 924(c) *to overcome the problems with the present subsection discussed [below]*") (emphasis added). First, it sought to clarify the statute's approach to suspended and concurrent sentences. Second, it wished to overcome the Supreme Court's holdings in *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), and *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), which negated the use of § 924(c) when another firearm penalty enhancement provision, such as that for armed robbery under 18 U.S.C. § 2113(d), applied. The government points to no evidence that in 1984 Congress sought to expand the meaning of "use". Moreover, Congress's adoption of the connective phrase "during and in relation to" could not have been intended to adjust for evolving problems of passive drug crimes; Congress only added drug trafficking offenses as predicate crimes in 1986. Pub.L. No. 99-308, 100 Stat. 456 (1986).

Moreover, the Senate Report relating to the 1984 change gave examples of use, both of them active: "pointing it at a teller or otherwise displaying it whether or not it is fired". S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. While these examples were not presented as exhaustive, they provide insight into the general class of behavior Congress had in mind. Even more indicative is the Senate Report's commentary on the "carry" provision which reads:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape.... Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

Id. at 3492 n. 10 (emphasis added). The reference to intended use shows that Congress envisioned the "carry" provision to punish a defendant who did not "display" or otherwise actively use the firearm, but who had at least taken the active step of carrying the gun on a drug trafficking foray. Thus the Senate evidently saw "use" as a comparatively narrow term, with "carry" picking up cases of an alternative type of activity, where

the defendant did not actively "use" the weapon. The majority has turned this relation around, giving "use" such a broad meaning as to leave no apparent role for "carry".

Another element of § 924(c)'s context is the kindred provision, § 924(d), adopted in its original form in 1968, four months before the original § 924(c) "use or carry" provision. Pub.L. No. 90–351, 82 Stat. 233 (1968). The current version of § 924(d) provides for forfeiture of firearms "used in any knowing violation" of certain enumerated offenses (such as unlawful interstate transport and false statements in acquiring firearms), and of firearms "intended to be used" in other enumerated offenses (such as crimes of violence and drug trafficking crimes). 18 U.S.C. § 924(d)(1). Thus Congress, clearly quite alert to the distinction between firearms "used" in commission of a crime and merely "intended" for such use, provided for forfeiture *before* the weapon was used in drug trafficking, to nip the risk in the bud, apparently saving § 924(c)'s five years additional imprisonment for cases of actual use. "[U]sing a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)". *Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2057, 124 L.Ed.2d 138 (1993).

Smith also observed, to be sure, that "it is clear from § 924(d)(3) that one who transports, exports, sells or trades a firearm 'uses' it within the meaning of § 924(d)(1)". *Id.* The Court inferred this from the specific statutes as to which § 924(d)(1) creates forfeiture liability, including, for example, 18 U.S.C. § 922(a)(5) (unlicensed transfer of a firearm to a resident of a different state); *id.* § 922(*l*) (importation of firearms). See *Smith*, — U.S. at — n. *, 113 S.Ct. at 2057 n. *. All of these, some of which the Court generalized under the word "transport", will nearly always involve active manipulation of the firearm. Given § 924(c)'s explicit "carry" provision, the parallelism inferred by the Court in *Smith* may not be complete. That does little, I think, to undermine § 924(d)'s value in evidencing congressional alertness to the difference between "use" and intent to use.

Congress was also explicitly conscious of the relation between § 924(c) and 18 U.S.C. § 2113(d), which provides sharply increased penalties for one who, committing a bank robbery or theft in violation of 18 U.S.C. § 2113(a) or (b), "assaults any person, or puts in jeopardy the life of any person by the *use* of a dangerous weapon or device". 18 U.S.C. § 2113(d) (emphasis added). The Senate Report in 1984 mentioned § 2113(d) and made clear that it intended that some defendants might be subject to *both* enhancements. S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. In his brief before the Supreme Court in *McLaughlin v. United States*, 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the Solicitor General of the United States used that history to sketch out a view of the intended meanings of "use" and "carry" in § 924(c). In *McLaughlin*, where the court held that an unloaded gun could be a "dangerous weapon" under that statute, the Solicitor General argued that weapons that are concealed and unmentioned do *not* suffice for conviction under the aggravated robbery statute (18 U.S.C. § 2113(d)) because "the robber has not 'used' the weapon to 'assault' anyone". Brief for the United States at 19, *McLaughlin* (No. 85–5189). He went on to press the point about the relative narrowness of the word "use" and the parallelism between § 924(c) and § 2113(d):

> *It appears that Congress is of the view that something more than the carrying of a gun is required to establish its use.* In response to this Court's decisions[,] *Simpson v. United States*, 435 U.S. 6 [98 S.Ct. 909, 55 L.Ed.2d 70] (1978), and *Busic v. United States*, 446 U.S. 398 [100 S.Ct. 1747, 64 L.Ed.2d 381] (1980), Congress amended 18 U.S.C. [§] 924(c) in 1984 to provide an additional penalty of five years' imprisonment for anyone who "uses or carries" a firearm during a crime of violence, including a "crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Thus, the additional penalty of Section 924(c) now applies even though the defendant is convicted under a provision like Section 2113(d) that provides for an enhanced penalty for the use of a

> dangerous weapon or device. In spelling that out in the legislative history, in fact, Congress used Section 2113(d) as an example, stating that a person convicted under Section 2113(d) would also be subject to five years' imprisonment under Section 924(c) if the dangerous weapon or device was a firearm. S.Rep. 98–225, 98th Cong., 1st Sess. 313–314 (1983). In its example, the Senate report referred to "using a gun * * * by pointing it at a teller or otherwise displaying it." *Id.* at 314 [1984 U.S.C.C.A.N. 3492]. In a footnote, the report noted that "evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm" under Section 924(c). S.Rep. 98–225, *supra*, at 314 n. 10 [1984 U.S.C.C.A.N. 3492]. Thus, Congress appeared to understand, as the language of Section 924(c) suggests, that there is a distinction between carrying a gun and using a gun.

Id. at 19 n. 18 (emphasis added). Of course we owe no special deference to the views of the Solicitor General. Cf. *Crandon v. United States*, 494 U.S. 152, 177–78, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (no deference owed to Department of Justice on interpretation of criminal statutes as they are "not administered by any agency but the courts"). Where he strongly presses a narrow reading of specific language in a criminal statute, however, it is certainly some evidence that that interpretation is a reasonable one, suggesting that, in the presence of another arguably reasonable reading, we are at least confronting a statutory ambiguity that under the rule of lenity should be resolved in favor of the narrow construction. In *United States v. Ray*, 21 F.3d 1134 (D.C.Cir.1994), we relied heavily on the Solicitor General's *McLaughlin* brief, saying, in our exposition of the word "use", "It is the brandishing or displaying, in other words, that the Court [in *McLaughlin*] said heightened the danger". *Id.* at 1137. We concluded that a defendant might "use" a concealed weapon (within the meaning of § 2113(d)) when he actively exploits its existence by *threatening* people with it. *Id.* at 1140–42. I would preserve the parallel treatment between "use" in both § 924(c) and § 2113(d), and require comparable activity.[2]

Nothing in *Smith* precludes limiting "use" to active employment. Its statement that "§ 924(c)(1)'s language sweeps broadly", — U.S. at —, 113 S.Ct. at 2054, means only that the proscribed use of firearms is not limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing the Court said expands "use" beyond active employment. The observation that a gun "at least must 'facilitat[e] or ha[ve] *the potential* of facilitating' ", *id.* at —, 113 S.Ct. at 2059 (emphasis added), does not support an expanded definition of "use"; the Court made that point in reference to the separate "in relation to" requirement.

While the majority attempts to fine-tune the concept of facilitation (and thereby, use) through its twin guideposts of proximity and accessibility, the ultimate result is that possession amounts to "use" because possession enhances the defendant's confidence.[3] See Op. at 113, 116; *McFadden*, 13 F.3d at 466.

2. The majority points out that the crime at issue in *McLaughlin* and *Ray*, bank robbery involving assault or jeopardizing a person's life, inherently involves force or the threat of force, and suggests that while reading "use" narrowly to cover only open brandishing or verbal allusions made sense there, a broader reading is necessary for a furtive crime such as possession of drugs. Maj. Op. at 115 n. 1. But the point of the Solicitor General's brief in *McLaughlin* was that Congress intended a consistent (and relatively narrow) reading of the word "use" in both contexts, § 2113(d) and the relatively generic § 924(c).

3. Occasionally, and quite understandably, a court taking the majority's view will forget even the veneer of a requirement of more than possession in connection with the predicate crime. "[Defendant] was also convicted of two or three counts of *use or possession* of a firearm in connection with drug trafficking crimes in violation of 18 U.S.C. § 924(c)(1)." *United States v. Windom*, 19 F.3d 1190, 1192 (7th Cir.1994) (emphasis added).

Had Congress intended that, all it need have mentioned is possession. Cf. 18 U.S.C. § 929(a) (additional punishment for one who "uses or carries a firearm *and is in possession* of armour piercing ammunition") (emphasis added). In this regard, the majority's test is either so broad as to assure automatic affirmance of any jury conviction or, if not so broad, is unlikely to produce a clear guideline. Thus, if the new standard proves anything less than a carte blanche for conviction, it will lead to the same sort of continuous and vacillating review of jury verdicts that our past jurisprudence has yielded and that the court so rightly deplores.

* * * * * *

Under my view of "use" there can be no serious argument that either Robinson or Bailey "used" the weapons as to which they were charged under § 924(c). But Bailey plainly transported his firearm in the trunk of his car, and the jury in his case was instructed to find whether the defendant had "used or carried" the weapon. Thus the question arises whether transportation of a firearm under these circumstances can sustain a conviction for carrying a firearm.

We have found "carry" to cover a gun carried, not on the defendant's person, but on that of a confederate and within easy reach of the defendant himself. *United States v. Joseph*, 892 F.2d 118, 126 (D.C.Cir.1989) (defendant at all times "within a few steps of, and usually no more than an arm's span from, the firearm"). We have also held that a jury could find that a defendant's control over confederates who carried weapons was enough to establish constructive possession, *United States v. Harrison*, 931 F.2d 65, 71 (D.C.Cir.1991), and thus upheld the conviction (which alternatively might have been sustained on a theory of aiding and abetting). The same understanding embraces the defendant who transports a weapon by motor vehicle *and* has as ready access to the weapon as he would if it were in his pocket. See, e.g., *United States v. Cardenas*, 864 F.2d 1528, 1533 (10th Cir.1989) (the gun "was within effortless reach of his hands, more accessible than if it were in his own pocket"). Both readings are consistent with the basic concept of carrying a weapon on one's person (hand, pocket or holster), extended to catch the criminal who uses either confederates or mechanical transport (car, truck, ship or plane) to keep the firearm moving with him. In the motor vehicle case, the location of the weapon can render it as readily accessible as one held by an associate—if it is on hand for instant use, e.g., tucked under the driver's seat or resting on the dashboard or front passenger's seat.

I do not believe § 924(c) can properly be extended from these situations to that of the defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Cf. *Cardenas*, 864 F.2d at 1534–35 (rejecting equation of "carry" with "transport"). Rather, consonant with an active notion of "use", with the Senate Report's example of a weapon carried in the defendant's pocket, see *supra* at 122, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

That is not to say that a defendant arrested with a gun in his trunk may never be convicted under § 924(c). Realistically, drug dealers often operate out of car trunks, returning from a distribution station to replenish drugs, deposit cash or retrieve a weapon. If the government presents evidence that the defendant handled the weapon by placing it in the car "during and in relation to" action taken in the commission of a predicate offense, that evidence would be sufficient to sustain a conviction. Alternatively, there may be cases where the government can

prove that the defendant bought the firearm such a short time before arrest on the drug trafficking offense as to sustain an inference (beyond a reasonable doubt) that he must have been handling it simultaneously with commission of the drug offense. But as a gun can obviously rest in a trunk for a long period, the mere fact of a gun's presence there, coupled with the defendant's use of the car for drug distribution, does not give rise to an inference of the necessary simultaneity of immediate access to the weapon (in a context of moving it about) and commission of the predicate crime. As there appears to be no evidence in the record against Bailey beyond his drug trafficking and the location of the weapon in the trunk, his conviction cannot be sustained on such a ground.

* * * * * *

The majority's expansive view of "use" virtually emasculates the role of the term "carry" in the statute. If "use" is understood to require real activity (such as brandishing, displaying or threatening), and "carry" to require conveying the firearm, coupled with immediate ability to put it to active use, both terms will have a meaningful yet distinct content, consistent with the language, context and legislative history of § 924(c).

* * * * * *

I would reverse the convictions of both Bailey and Robinson.

SILBERMAN, Circuit Judge, dissenting:

I think it most unfortunate that the majority opinion is directed, virtually entirely, at our past precedent dealing with the difficult question presented. We agreed, through the *en banc*ing of these cases, that we needed to think harder about § 924(c) to see if we could arrive at a more coherent standard firmly rooted in the statute. The standard advanced in Judge Williams' lucid opinion represents the product of that rethinking—at least on the part of the dissenters—and I would have thought that the majority might have marshaled the effort to confront fully the analysis set forth in the dissent.

WESTLAW KEY NUMBER SYSTEM

caine base. Gaulteau relies on this court's statement in *United States v. Brown*, 859 F.2d 974, 975–76 (D.C.Cir.1988) (per curiam), that "'[c]ocaine base' ... is any form of cocaine with the hydroxyl radical" and on the admission of the DEA chemist testifying in the present case that the hydroxyl radical was not present in the substance she tested. In *Brown*, we rejected a vagueness challenge to 21 U.S.C. § 841(b)(1), holding that the statute was valid because cocaine base is capable of "objective definition by means of chemical analysis." 859 F.2d at 976; *see also United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C.Cir.1989). As one district judge recognized recently, we "clearly did not indicate that [the hydroxyl radical description] was the sole acceptable definition of cocaine base." *United States v. Michael*, 788 F.Supp. 1, 4 (D.D.C.1992), *aff'd mem.*, No. 92–3108, 1993 WL 185713, 1993 U.S.App. LEXIS 12873 (D.C.Cir. May 20, 1993) (per curiam). *Accord, United States v. Wheeler*, 972 F.2d 927, 930 (8th Cir.1992); *United States v. Shaw*, 936 F.2d 412, 416 (9th Cir. 1991).[1] Here, the government presented the testimony of a qualified expert who positively identified the substance tested as cocaine base. That testimony was sufficient to survive the defense motion and support the conviction. *Cf. United States v. Turner*, 928 F.2d 956, 960 n. 1 (10th Cir.) (noting expert testimony that qualified chemist can "easily differentiate" cocaine base from cocaine hydrochloride), *cert. denied*, — U.S. —, 112 S.Ct. 230, 116 L.Ed.2d 187 (1991).

Finally, Gaulteau's argument that 21 U.S.C. § 841(b)(1) is unconstitutionally vague in the absence of an established definition of the term "cocaine base," is without merit. *See Cyrus*, 890 F.2d at 1248 (capability of objective definition of cocaine base defeats vagueness challenge); *see also Shaw*, 936 F.2d at 416 (constitutionality of § 841(b)(1) does not depend on adoption of any particular definition, so long as cocaine base is "objectively distinguishable"). The statute is valid, and the evidence supports the conviction. The district court's judgment is

Affirmed.

1. We note that the "hydroxyl radical" description has been criticized as "simply incorrect." *See Michael*, 788 F.Supp. at 3; *cf. Wheeler*, 972 F.2d at 929 (reciting expert testimony that cocaine base does not contain hydroxyl radical). We will not revisit the correctness of that description here, in the absence of an appropriate record. We simply hold that *Brown* did not establish the hydroxyl radical as a "legal definition" of cocaine base with which the government must comply in order to prove a violation of section 841(b).

UNITED STATES of America

v.

Roland J. BAILEY, Appellant.

No. 90–3119.

United States Court of Appeals,
District of Columbia Circuit.

Oct. 8, 1993.

Before: MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

PER CURIAM.

Appellant's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is granted and this case will be reheard by the Court sitting *en banc*.

It is **FURTHER ORDERED**, by the Court *en banc*, that the judgment of the court filed herein on June 18, 1993, 995 F.2d 1113, is hereby vacated.

APPENDIX C

tory Diseases 148–49 (James Merchant et al., eds., 1986) (ILO scores under 1/0 "are usually regarded as normal or as exhibiting essentially no evidence of pneumoconiosis," whereas those 1/0 and above "are generally regarded as positive for pneumoconiosis"). A finding of a disease is surely equivalent, in normal terminology, to a diagnosis, and thus the PPLs certainly offer no interpretation that repudiates or is irreconcilable with an existing legislative rule.

We stress that deciding whether an interpretation is an amendment of a legislative rule is different from deciding the substantive validity of that interpretation. An interpretive rule may be sufficiently within the language of a legislative rule to be a genuine interpretation and not an amendment, while at the same time being an incorrect interpretation of the agency's statutory authority. *Cf. Fertilizer Institute*, 935 F.2d at 1308 (petitioners' argument "confuses the question whether the agency is interpreting a statute with the question whether the agency is thoroughly, or properly, interpreting the statute"). Here, petitioners have made no attack on the PPLs' substantive validity. Nothing that we say upholding the agency's decision to act without notice and comment bars any such substantive claims.

Accordingly, the petitions for review are *Dismissed.*

KEY NUMBER SYSTEM

UNITED STATES of America

v.

Roland J. BAILEY, Appellant.

No. 90-3119.

United States Court of Appeals, District of Columbia Circuit.

Argued April 5, 1993.

Decided June 18, 1993.

Defendant was convicted of possession with intent to distribute cocaine, using or carrying firearm in connection with drug trafficking offense, and possession of firearm by felon after jury trial in the United States District Court for the District of Columbia, Stanley S. Harris, J. Defendant appealed. The Court of Appeals, D.H. Ginsburg, Circuit Judge, held that: (1) defendant was not entitled to instruction on simple possession of cocaine as lesser-included offense of possession of intent to distribute, and (2) loaded high-caliber gun found in trunk of car driven by defendant could be considered "used during and in relation to" drug trafficking crime.

Affirmed.

D.H. Ginsburg, Circuit Judge, dissented as to part II.B and filed opinion.

1. Criminal Law ⇐814(20)

Defendant was not entitled to instruction on simple possession of cocaine as lesser-included offense of possession with intent to distribute cocaine, where there was no evidence from which jury could rationally have concluded that defendant possessed cocaine without intending to distribute it since he was nabbed with 30 grams of cocaine packaged for street distribution and with more than $3,000 in small bills. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C.A. § 841(a).

2. Criminal Law ⇐795(1)

District judge is required to give lesser-included offense instruction only when jury could rationally find defendant guilty of lesser offense, yet acquit him of greater.

3. Weapons ⇐4

Loaded high caliber weapon located in trunk of automobile along with $3,216 in small bills was "used" to facilitate defendant's sale of narcotics and possession of drugs that necessarily preceded those transactions, for purposes of conviction for use of firearm during and in relation to drug trafficking activity, even though the gun was not within the defendant's reach while he was driving; cocaine found in car packaged for sale and small bills in trunk logically supported inference that defendant had already been dealing drugs from his car and loaded gun in trunk was sufficiently accessible so as to have been used to protect prior distribution effected outside confines of passenger compartment of car. 18 U.S.C.A. § 924(c)(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Weapons ⇐4

Evidence of nexus between particular drug offender and firearm, for purposes of conviction for offense of use of firearm during and in relation to drug trafficking crime, can be, and usually is, satisfied by proof that defendant actually or constructively possessed gun. 18 U.S.C.A. § 924(c)(1).

5. Weapons ⇐4

To establish that weapon was "used," for purpose of conviction for use of firearm during commission of drug trafficking offense, government need not establish that defendant brandished or discharged weapon or even that he was carrying gun at time of specific transaction; rather, in addition to showing possession, i.e., nexus between firearm and offender, government need only prove connection between firearm and underlying drug offense; government is obliged to show that firearm was available to provide protection to defendant in connection with his engagement in drug trafficking. 18 U.S.C.A. § 924(c)(1).

Appeal from the United States District Court for the District of Columbia (CR 89-00310-01).

James G. Duncan, with whom Roy T. Englert, Jr., Washington, DC (appointed by this court) were on the brief, for appellant.

Barbara K. Bracher, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty. at the time the brief was filed, John R. Fisher, Elizabeth Trosman, and Odessa Vincent, Asst. U.S. Attys., Washington, DC, were on the brief, for appellee.

* Except Part II.B., which is filed *per curiam.*

Before D.H. GINSBURG, SENTELLE, and RANDOLPH, Circuit Judges.

D.H. GINSBURG,* Circuit Judge:

Roland J. Bailey appeals his conviction for (1) possession with intent to distribute five grams or more of cocaine in violation of 21 U.S.C. § 841(a); (2) using or carrying a firearm in connection with that drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). He alleges that the district court committed reversible error by refusing to instruct the jury on simple possession as a lesser included offense of possession with intent to distribute cocaine; that there was insufficient evidence of his having "used" a gun to convict him under 18 U.S.C. § 924(c); and that the 16-month delay between his arrest and indictment violated his right to a speedy trial pursuant to 18 U.S.C. § 3161(b). We affirm the convictions on all counts.

I. BACKGROUND

In May 1988 Officers Ronald T. Washington and Kevin Rice of the Metropolitan Police Department stopped Bailey's car after noticing that it had no front license plate and no inspection sticker. Officer Washington asked Bailey for his driver's license but Bailey instead handed him a District of Columbia identification card. Officer Washington then ordered Bailey to get out of his car. As Bailey exited the car, Officer Washington saw him push something between the seat and the front console. Upon searching the passenger compartment, Officer Washington found one round of ammunition and 27 plastic bags containing a total of 30 grams of cocaine. After placing Bailey under arrest, Officer Rice searched the trunk and found there a loaded 9-mm. pistol and $3,216 in cash, mostly small bills.

Later that month Bailey was indicted in the Superior Court of the District of Columbia on D.C. drug and weapons charges. In September 1989 a superseding indictment was handed down in federal district court,

charging Bailey with the federal drug and weapon charges enumerated above.

At Bailey's trial Detective Charles DiDomenico, a narcotics expert, testified that the drugs found in the appellant's car were packaged for sale in $50 bags and that the quantity and packaging were "not consistent with personal use." He also stated that drug dealers frequently carry weapons "not only to protect themselves, but [also] to protect their assets, drugs and money." The jury found the appellant guilty as charged, and the district court sentenced him to concurrent prison terms of 51 months each on the first and third charges and sixty months on the second charge.

II. ANALYSIS

As indicated above, the appellant offers three grounds for appeal.

A. Instruction on Lesser Included Offense

[1] First, the appellant argues that the district court erred in refusing to instruct the jury on simple possession of cocaine as a lesser-included offense of possession with intent to distribute cocaine. Not so.

[2] The district judge is required to give a lesser-included offense instruction only when "a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck v. United States*, 489 U.S. 705, 716 n. 8, 109 S.Ct. 1443, 1451 n. 8, 103 L.Ed.2d 734 (1989); *see also United States v. Thornton*, 746 F.2d 39, 47 (D.C.Cir.1984) (lesser-included offense instruction is required "if there is any evidence fairly tending to bear upon the lesser included offense, 'however weak' that evidence may be") (quoting *Belton v. United States*, 382 F.2d 150, 155 (D.C.Cir.1967)). There must "be some rational basis for the lesser charge; otherwise it is merely a device for [a] defendant to invoke the mercy-dispensing prerogative of the jury." *United States v. Sinclair*, 444 F.2d 888, 890 (D.C.Cir.1971); *see also Kelly v. United States*, 370 F.2d 227, 229 (D.C.Cir.1966) ("An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction").

In this case there was no evidence from which a jury could rationally have concluded that Bailey possessed the cocaine without intending to distribute it. He was nabbed with the 30 grams of cocaine appropriately packaged for street distribution and with more than $3000 in small bills. According to the uncontradicted testimony of the Government's narcotics expert, possession of 27 packages each containing $50 worth of cocaine is inconsistent with merely personal use. *See United States v. Beckham*, 968 F.2d 47, 53 (D.C.Cir.1992) (upholding denial of instruction on lesser-included offense of simple possession where Government drug expert testified without rebuttal that stash was incompatible with personal use); *accord United States v. Payne*, 805 F.2d 1062, 1067 (D.C.Cir.1986) ("If the jury believed the Government's [expert testimony], the jury would have had no rational basis for returning a guilty verdict of simple possession").

As in *Beckham*, therefore, "No aspect of the government or defense cases—not even a combination of aspects of each—supports a simple possession theory." 968 F.2d at 52. Accordingly, we affirm Bailey's conviction for possession with intent to distribute.

B. Use of the Firearm

[3] Section 924(c)(1) provides, in pertinent part:

> Whoever, during and in relation to any ... drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment provided for such ... drug trafficking crime, be sentenced to imprisonment for five years.

Bailey claims that there was insufficient evidence for the jury to find that he "use[d]" the 9-mm. gun found in his trunk "during and in relation to" a drug trafficking crime.

"As a jury has found [the appellant] guilty, we must consider the evidence in the light most favorable to the Government," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), and allow the Government "the benefit of all reasonable inferences that may be drawn from the evidence." *United*

States v. Sutton, 801 F.2d 1346, 1358 (D.C.Cir.1986). In determining the sufficiency of the evidence, we must affirm the appellant's conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *United States v. Derr*, 990 F.2d 1330, 1336 (D.C.Cir.1993); *United States v. Morris*, 977 F.2d 617, 619 (D.C.Cir. 1992); *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990); *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990).

[4] This court has fashioned a two-part test to determine whether a defendant "used" a firearm "during and in relation to" the drug trafficking crime he committed. *See Derr*, 990 F.2d at 1337; *Jefferson*, 974 F.2d at 205. First, there must be evidence of a "nexus ... between [the] particular drug *offender* and the firearm." *Long*, 905 F.2d at 1577 (emphasis added). This element can be, and usually is, satisfied by proof that the defendant actually or constructively possessed the gun. *See Derr*, 990 F.2d at 1337. Second, there must be evidence "that the guns facilitate[d] the predicate *offense* in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.1992) (emphasis added); *accord Derr*, 990 F.2d at 1337. "Both elements must be proven to establish criminal liability under § 924(c)." *Jefferson*, 974 F.2d at 205.

[5] Because the appellant concedes that he possessed the firearm, we need address only the question whether the Government has shown that the gun facilitated the appellant's commission of a drug trafficking offense. It is well-settled that "mere possession of a gun at the time that the crime is committed is not enough to establish use." *United States v. Bruce*, 939 F.2d 1053, 1054 (D.C.Cir.1991). On the other hand, the Government need not establish that the defendant brandished or discharged the weapon, *see Morris*, 977 F.2d at 621; *Long*, 905 F.2d at 1576; *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989); *United States v. Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *United States v. Plummer*, 964 F.2d 1251, 1255 (1st Cir.1992); *United States v. Alvarado*, 882 F.2d 645, 653 (2d Cir.1989); *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir.1989); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir.1989); *United States v. Tolliver*, 937 F.2d 1183, 1190 (7th Cir.1991); *United States v. Lyman*, 892 F.2d 751, 753 (8th Cir.1989); *United States v. Matra*, 841 F.2d 837, 841–43 (9th Cir.1988); *United States v. Mason*, 658 F.2d 1263, 1270–71 (9th Cir.1981); *United States v. Moore*, 580 F.2d 360, 362 (9th Cir.1978), or even "that he was carrying the gun at the time of a specific transaction." *United States v. Knox*, 950 F.2d 516, 518 (8th Cir.1991).

Rather, in addition to showing possession (i.e. a nexus between the firearm and the offender), the Government need only "prove a connection between the firearm and an underlying drug offense," here possession with intent to distribute cocaine. *Jefferson*, 974 F.2d at 206; *accord Castro-Lara*, 970 F.2d at 983; *United States v. Robertson*, 706 F.2d 253, 256 (8th Cir.1983); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985). More precisely, "the Government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir.1989); *accord United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.1990) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that presence of the weapon was in some way connected with drug trafficking"); *Stewart*, 779 F.2d at 540 (Government must show that defendant possessed firearm and "that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others").

The Supreme Court has recently endorsed an "expansive" understanding of what constitutes use "in relation to" a drug trafficking offense. *Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2058, 124 L.Ed.2d 138 (1993). In *Smith* the Supreme Court cites the Webster Dictionary definition of "in relation to" as meaning "with reference to"

or "as regards." *Id.* (*quoting* Webster's New International Dictionary of the English Language, at 2102). The Court then states that "[t]he phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, *supra* at ——, 113 S.Ct. at 2059. Modifying the verb "use" with "in relation to" serves the purpose of " 'allay[ing] explicitly the concern that a person could be' punished under § 924(c)(1) for committing a drug trafficking offense 'while in possession of a firearm' even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at ——, 113 S.Ct. at 2058 (*quoting Stewart*, 779 F.2d at 539 (Kennedy, J.)).

Here the defendant was carrying in the front seat of his car crack cocaine neatly packaged for sale in $50 bags, and in the trunk $3,216 in small bills. The trier of fact could reasonably infer that the money was the proceeds of several already-completed drug transactions. *Cf. United States v. Curry*, 911 F.2d 72, 80 (8th Cir.1990) ("we believe it was permissible to infer that the large sums of unexplained cash found in the same bedroom as the guns came, at least in part, from drug sales" given the large quantities of high purity cocaine found elsewhere in the house); *United States v. Beverly*, 921 F.2d 559, 563 (5th Cir.1991) ("A jury ... could reasonably connect the [$2,200 in] cash to the drug trafficking"); *compare Bruce*, 939 F.2d at 1055–56 (showing that gun was available only to protect future intended distribution of drugs insufficient for § 924(c) conviction). As the Government's expert witness testified, a drug dealer often carries a gun in order to protect himself, his contraband, and his money. *See United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir.1985) (recognizing "the utility of firearms in advancing criminal adventures in narcotics" and observing that "[w]eapons can be used for protection or intimidation and therefore facilitation of illegal transactions"); *accord United States v. Grant*, 545 F.2d 1309, 1313 (2d Cir.1976); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir.1976); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.1989); *Curry*, 911 F.2d at 80; *United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990); *United States v. Milham*, 590 F.2d 717, 721 (8th Cir.1979); *Stewart*, 779 F.2d at 540; *Mason*, 658 F.2d at 1271.

To be sure, the gun here was not within Bailey's reach while he was driving. In that circumstance, "the court's critical concern is not whether the gun was instantly available or exclusively dedicated to the narcotics trade, but whether it was available for use in connection with the narcotics trade." *Castro-Lara*, 970 F.2d at 983 (quotation marks and citation omitted); *accord United States v. Boyd*, 885 F.2d 246, 250 (5th Cir.1989) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that the presence of the weapon was in some way connected with the drug trafficking"); *Young-Bey*, 893 F.2d at 181 (jury may "infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)"); *cf. United States v. Acosta-Casares*, 878 F.2d 945, 952 (6th Cir.1989) (" 'uses' and 'carries' [in § 924(c)(1)] should be construed broadly to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions").

Indeed, if Bailey sold drugs from anywhere outside the passenger compartment of his car, *e.g.*, in a building or on a street corner—a rather likely scenario, to say the least—then he could remove the gun from the trunk and carry it with him as he conducted this risky business. *Cf. Jefferson*, 974 F.2d at 207 (gun stored in backyard next to contraband "was sufficiently accessible"); *Castro-Lara*, 970 F.2d at 983–84 (unloaded gun in locked automobile trunk was available for use during and in relation to drug trafficking crime); *Beverly*, 921 F.2d at 561–63 (unloaded guns and ammunition in safety deposit box underneath mattress in room where drugs were found sufficient to convict under § 924(c)); *Molinar-Apodaca*, 889 F.2d at 1419–1424 (upholding conviction where gun and cash were in locked safe in house

and drugs were stashed in shed outside); *Rosado*, 866 F.2d at 968–69 (evidence sufficient for § 924(c)(1) conviction where defendant left gun in own car and conducted drug transaction in nearby car); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir.1991) (gun in passenger compartment of car sufficiently available to defendant carrying drugs and loaded ammunition clip as he exited nearby building); *Curry*, 911 F.2d at 80 (although "found in a different room than the cocaine" gun was "readily available to secure the possession of [appellant's] cocaine and cash"); *Stewart*, 779 F.2d at 539 (defendant in car in front of his residence had "rifle under his control in the trunk of his car"). Moreover, it was unlikely that in conducting a sale—the moment of maximum exposure to depredation—the defendant would fail to protect his inventory, including the 27 bags of cocaine that later formed the basis of the indicted charge. The jury could reasonably infer therefore that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions. *See United States v. Hadfield*, 918 F.2d 987, 998 (1st Cir.1990) ("so long as one purpose in situating the weapon nearby was to protect the narcotics enterprise, that need not have been defendant's sole purpose"); *Stewart*, 779 F.2d at 539 ("Given the use of firearms in some drug transactions ... and the known risks of conducting an illegal drug business, the jury could infer from all of the evidence that [defendant]'s possession of the [firearm] outside his residence was intended to facilitate the drug operations or secure the premises where contraband and other evidence were located"); *see generally United States v. Ingraham*, 832 F.2d 229, 240 (1st Cir.1987) ("The law is not so [ostrich-like] as to compel a criminal jury to ignore that which is perfectly obvious").

The appellant argues that because the gun was in the trunk, under our holdings in *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir. 1991) and *United States v. Derr*, 990 F.2d 1330, 1339 (D.C.Cir.1993), it can not be deemed to have protected or facilitated his past possession of the cocaine. In *Bruce* the court found that the small derringer in the defendant's raincoat could not have been used to protect his possession of drugs because the small gun was "hardly the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Bruce*, 939 F.2d at 1055. Instead, the gun was clearly intended "to be used for defendant's protection at the time and place of subsequent distribution." *Bruce*, 939 F.2d at 1056. Similarly, in *Derr* we found that the placement of an unloaded gun behind a padlocked door in a house "suggested that it was far more likely [to] ... be used to protect the [future] distribution, rather than the possession, of the drugs." *Derr*, 990 F.2d at 1339. Indeed, in getting his gun from the closet the defendant in *Derr* risked "expos[ing] the drugs to capture," so that "the gun seems to have been put where it was least likely to protect possession of the drugs." *Id.* (footnote omitted).

Here, in contrast, the cocaine packaged for sale and the $3,216 in small bills in the trunk logically support the inference that Bailey had already been dealing drugs from his car. And the loaded gun in the trunk was sufficiently accessible to have been used to protect a prior distribution effected outside the confines of the passenger compartment of the car.

In protecting such an earlier distribution of drugs, the gun was necessarily used also to protect Bailey's earlier possession of cocaine. As he walked from his car to the point of sale, like any drug dealer he was constantly in danger of being attacked by bandits or by a potential customer. Until the actual sale, of course, he possessed the narcotics. In effect, for a drug dealer on the streets, possession and distribution are inextricably linked, *cf. Bruce*, 939 F.2d at 1055 ("in the typical crack house possession and distribution are intertwined"), and the jury could reasonably conclude that during the tense moments leading up to the exchange of drugs and money, Bailey used the gun in the trunk to protect his inventory of drugs (including the 27 bags recovered by the police). *Accord Derr*, 990 F.2d at 1337 ("there must be evidence showing that the firearm actually facilitated the *possession* of the drugs") (emphasis in original).

For the foregoing reasons, we believe that *Derr* and *Bruce* can be distinguished from the situation here. In any event, the precedential value of *Derr* and *Bruce* has been called into question by the Supreme Court's recent decision in *Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2058, 124 L.Ed.2d 138 (1993), which adopts a much less restrictive interpretation of what constitutes "use" of a firearm "in relation to" a drug trafficking offense. *Smith* states that a gun is used in relation to a drug trafficking offense if "the firearm [has] some purpose or effect with respect to the drug trafficking crime." *Id.* at —, 113 S.Ct. at 2059. Clearly, the gun had the purpose of protecting the cash in the trunk, and only slightly less obviously, had the purpose of protecting the drugs and money on Bailey's person. This is not a case where "the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at —, 113 S.Ct. at 2059 (internal citation omitted). When § 924(c) is construed "in accord with its ordinary or natural meaning," as we are reminded to do in *Smith*, *id.* at —, 113 S.Ct. at 2054, we think a rational jury could easily have concluded that Bailey "used" the loaded high-caliber gun in the trunk of the car he was driving "during and in relation to" a drug trafficking crime.

C. Speedy Trial Act Challenge

Bailey argues that the 16-month delay between his arrest and his indictment in federal court violates his right to a speedy trial pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(b). In his brief the appellant concedes that *United States v. Mills*, 964 F.2d 1186, 1189 (D.C.Cir.1992) (*en banc*), forecloses his appeal on this issue, but states that he wishes to preserve his point in case the Supreme Court grants certiorari in *Mills*. Since the filing of Bailey's brief, however, the Court has denied certiorari in *Mills*, — U.S. —, 113 S.Ct. 471, 121 L.Ed.2d 378 (1992), and we therefore affirm the district court on this issue.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is in all respects

Affirmed.

D.H. GINSBURG, Circuit Judge, dissenting as to Part II.B.:

Sometimes the law *is* "a ass, a idiot," Mr. Bumble. Our recent holdings in *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), and *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), are cases in point. But until the Supreme Court or this court sitting *en banc* changes the law, those decisions are the law and we must apply them faithfully. Because I do not believe that our disposition of the § 924(c) issue can honestly be reconciled with *Derr* and *Bruce*, I respectfully dissent.

In *Derr* an unloaded .357 magnum and nine rounds of ammunition were found alongside cash, drugs packaged for sale, and a scale, all in a locked closet in an apartment. There was incontestable evidence of drug trafficking from the apartment. *See* 990 F.2d at 1332, 1338. Nonetheless, this court held that the gun could not have been " 'used' to facilitate the predicate offense" of possession with intent to distribute drugs because the unloaded firearm was too inaccessible to protect the possession of the drugs in the apartment. *Id.*, at 1337. Similarly, in *Bruce* a loaded gun was found stored with drugs, cash, and ziplock bags in a raincoat hanging in a closet. Again the court held that the gun's location was too remote from the defendant for him to use it to protect his possession of the drugs and thus to facilitate the predicate offense of possession with intent to distribute the drugs. *See* 939 F.2d at 1056.

The present case presents a similar fact pattern: a loaded 9-mm. pistol was found alongside cash in the locked trunk of a car, while the drugs were located next to the defendant in the front seat of the car. The court distinguishes *Derr* and *Bruce*, however, on the ground that a jury could reasonably infer that Bailey had used the gun here to protect himself and his goods during drugs sales made before his arrest, as well as the cash proceeds thereof. The problem is that the exact same inference could easily have been drawn in *Derr* and *Bruce*, but the court in those cases found the evidence insufficient as a matter of law to support a conviction for

using a firearm to facilitate a drug trafficking offense.

I do not see any principled basis for distinguishing *Derr* or *Bruce* from the present case. That the gun in *Derr* was unloaded is certainly not dispositive. An unloaded gun can facilitate a drug trafficking crime almost as well as a loaded gun, by emboldening its owner and intimidating others. *See United States v. Gutierrez-Silva*, 983 F.2d 123, 124–25 (8th Cir.1993) (upholding § 924(c) conviction involving unloaded gun in closet of apartment containing no ammunition; crediting expert's testimony that "it is very difficult for a person to determine whether a gun was loaded or not when the gun is pointed at that person"); *cf. McLaughlin v. United States*, 476 U.S. 16, 17, 106 S.Ct. 1677, 1678, 90 L.Ed.2d 15 (1986) (holding that unloaded handgun is "dangerous weapon" under federal bank robbery statute on the grounds that a gun "is always dangerous even though it may not be armed").* Nor can *Bruce* be distinguished on the ground that the defendant there possessed a smaller firearm, a Derringer. The court can not substitute its judgment for the jury's by inferring that an otherwise accessible gun is too small to be useful.

Such particularistic distinctions are all beside the point anyway under the highly formalistic analysis that this circuit has apparently adopted. In order to uphold a conviction under § 924(c) there must be evidence that the gun "facilitate[d] the predicate offense in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.1992). Although the issue of what constitutes a "predicate offense" in this context appears not to have been contested in prior cases, our caselaw requires that a § 924(c) conviction be predicated upon a drug offense charged in the indictment and proved at trial—which in this case could only be possession with intent to distribute. *See, e.g., Derr*, 990 F.2d at 1337 (gun must have provided protection during "the time of the possession which is the basis of the charge"); *cf. United States v. Laing*, 889 F.2d 281, 288 (D.C.Cir.1989) (upholding § 924(c) conviction despite acquittal for predicate offense because jury may have still been "convinced of the defendant's guilt").

Thus when the defendant is charged only with possession, "there must be evidence showing that the firearm actually facilitated the *possession* of the drugs." *See Derr*, 990 F.2d at 1337 (emphasis in original). I for one cannot imagine how a gun in a locked car trunk could have been used to protect the possession of the 27 bags in the front seat—if one accepts the premise that the guns in *Derr* and *Bruce* could not protect the drugs with which they were closeted. *See Derr*, 990 F.2d at 1337–1339 (unloaded gun stowed together with ammunition, drugs, and cash in locked closet in apartment insufficiently accessible to protect drugs in same closet); *Bruce*, 939 F.2d at 1056 (gun in raincoat hanging in closet not sufficiently available to protect drugs in pocket of same raincoat).

It is irrelevant that the jury here might reasonably have inferred that the gun was used to protect the possession of drugs Bailey had sold earlier or the cash proceeds of those sales, because neither the cash nor the already-sold drugs formed "the basis of the indicted charge" against him. *Compare Bruce*, 939 F.2d at 1055 (rejecting Government's argument "that since possession of drugs with intent to distribute is a 'continuing crime,' " proximity is sufficient to establish "use") *with* Op. at 1118 ("The jury could reasonably infer ... that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions").

All that said, it seems to me that the "predicate offense" analysis of our circuit defies both apparent congressional intent and common sense. Congress clearly enacted § 924(c) in order to deter drug dealers from

* *See also* DIRTY HARRY (Warner Bros. 1971) (bank robber decides not to reach for pistol when inspector points gun at him and says, "I know what you're thinking: 'Did he fire six shots, or only five?' Well, to tell you the truth, in all this excitement I've kinda lost track myself. But being this is a .44 magnum, the most powerful handgun in the world, and would blow your head clean off, you've got to ask yourself one question: 'Do I feel lucky?' ... Well, do ya, punk?") (*quoted in* Eric Bailey, *How to Get Your Own Back*, DAILY TELEGRAPH, Feb. 5, 1993, at 17).

arming themselves, which vastly enhances the threat they pose to the community. *See Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2059, 124 L.Ed.2d 138 (1993), ("introduction [of guns] into the scene of drug transactions dramatically heightens the danger to society") (*quoting United States v. Harris*, 959 F.2d 246, 262 (D.C.Cir.1992)). Common sense indicates that although he was not charged with distribution, Bailey had in fact been dealing drugs; he was not carrying more than $3000 in small bills for nothing and he was not planning to give the last of his drugs away free or to raffle them off for charity. Common sense also suggests that Bailey had taken the gun along to facilitate his drug transactions; he was not just delivering the gun to his fearful grandmother for use as domestic protection.

On its face § 924(c) reaches the use of a firearm "in relation to *any* ... drug trafficking crime," not only to a "predicate [drug] offense" charged against the defendant. Presumably, therefore, if we were writing on a clean slate, we might hold that the "related" drug trafficking crime need not have been charged so long as all of its elements are proved beyond a reasonable doubt. *Cf.* Op. at 1116–17 (stating that jury could reasonably infer that money was proceeds of prior drug distributions). Our circuit, however, in *Bruce* and *Derr* ignored ordinary rules of construction and adopted a cramped interpretation of § 924(c). Were it not for those cases I would gladly join the majority in upholding the § 924(c) conviction.

IN THE
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No. 94-

ROLAND J. BAILEY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

CERTIFICATE OF SERVICE

I, James G. Duncan, counsel for Roland J. Bailey, and a member of the Bar of this Court, hereby certify that on this 28th day of December, 1994, one copy of the Petition for a Writ of Certiorari in the above-captioned case was served by messenger on the following counsel for the United States of America:

Honorable Drew S. Days, III
Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that the following party required to be served has been served:

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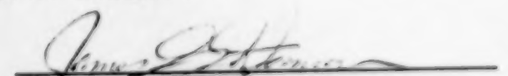

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ORIGINAL

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